

Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges

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NOTE

DOCTRINAL RECONSTRUCTION: RECONCILING CONFLICTING STANDARDS IN ADJUDICATING JUVENILE CURFEW CHALLENGES

Patryk J. Chudy

INTRODUCTION	519
I. HISTORY AND DEVELOPMENT OF CURFEW LAWS	523
A. Curfew Development in the United States	523
B. The U.S. Supreme Court Denies Certiorari: <i>Bykofsky</i> <i>v. Borough of Middletown</i>	527
1. <i>District Court Proceedings in Bykofsky</i>	527
2. <i>Post-Bykofsky, Pre-Qutb Juvenile Curfew Cases</i>	530
C. The Fifth Circuit Upholds Juvenile Curfew Under Strict Scrutiny: <i>Qutb v. Strauss</i>	533
II. CONSTITUTIONAL RIGHTS OF MINORS: DETERMINING THE APPROPRIATE LEVEL OF SCRUTINY FOR ADJUDICATING JUVENILE CURFEW CHALLENGES	536
A. <i>Bellotti v. Baird</i> : Determining a Juvenile's Right to Abortion Access	537
B. Other Cases Analyzing the Constitutional Rights of Minors	539
III. CURRENT STATE OF AFFAIRS: THREE RECENT CIRCUIT COURT DECISIONS	541
A. <i>Hutchins v. District of Columbia</i>	541
B. <i>Nunez v. City of San Diego</i>	548
C. <i>Schleifer v. City of Charlottesville</i>	551
IV. RECONCILING CONFLICTING STANDARDS IN ADJUDICATING JUVENILE CURFEW CHALLENGES	554
A. Determining the Appropriate Level of Constitutional Scrutiny	554
1. <i>Articulating the Standard</i>	554
2. <i>Examining the Applied Standard</i>	557
a. <i>Extent of the State Interest</i>	557
b. <i>The Means-Ends Fit</i>	558
i. <i>Defects in Means-Ends Fit: The Time</i> <i>Dimension</i>	558
ii. <i>Defects in Means-Ends Fit: The Age</i> <i>Correlation</i>	562

B. Curfew Drafting: Ensuring Sufficient Exceptions Without "Swallowing the Rule"	564
1. <i>Fundamental Rights: Interstate v. Intrastate Right to Travel</i>	566
2. <i>Fundamental Rights: The First Amendment Exception</i>	568
V. PROPOSED SOLUTION: APPLICATION OF INTERMEDIATE SCRUTINY	569
A. Countering Objections to the Application of Intermediate Scrutiny.....	570
B. Identifying the Juvenile Crime Problem: Sources, Characteristics, and Alternative Measures of Control.....	576
C. Applying the Intermediate Scrutiny Standard	579
CONCLUSION	583

INTRODUCTION

Reports of rampant juvenile crime pervade the media.¹ Youth crime and victimization have reached epidemic proportions, both within the context of gangs and without.² Public outcry has been intense, as politicians and commentators nationwide search for effective ways to stem the tide of juvenile violence and victimization.³ Among

¹ See, e.g., Eric Ferkenhoff, *15-Year-Old Held in School Slaying*, CHI. TRIB., Feb. 17, 1999, Metro Northwest, at 1; *15-Year-Old Is Arrested in Bomb Threat at School*, N.Y. TIMES, Dec. 9, 1998, at B4; Mark Obmascik, *High School Massacre: Columbine Bloodbath Leaves Up to 25 Dead*, DENV. POST, Apr. 21, 1999, at 1A; John Schwartz, *Boys' Ambush at Ark. School Leaves 5 Dead*, WASH. POST, Mar. 25, 1998, at A1; David Weber & Beverly Ford, *Boy, 13, Nabbed in Plot to Burn Hub School and Students*, BOSTON HERALD, Nov. 20, 1998, at 1; see also Kay S. Hymowitz, *Kids Today Are Growing Up Way Too Fast*, WALL ST. J., Oct. 28, 1998, at A22 (detailing increased risk behavior among pre-teen-aged children, as reflected in crime statistics, surveys on sexual activity, and surveys on substance abuse).

² From 1988 to 1997, the total number of persons under 18 years of age arrested for violent crimes rose by almost 50%. See FBI, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1997, at 226 tbl.32 (1998). In comparison, the total number of arrests in the same category for persons 18 and older rose by 19%. See *id.* In 1997, the total number of murder victims aged 18 and over was more than 13,000, while there were over 1700 murder victims under the age of 18. See *id.* at 18 tbl.2.5. Similarly, over 9800 murder offenders were 18 and over, compared to approximately 1500 murder offenders under the age of 18. See *id.* at 18 tbl.2.6. The 20- to 24-year-old age group contained the largest number of both murder victims and offenders. See *id.* at 18 tbls.2.5-6. Although the 20- to 24-year-old age group contains the largest number of both murder victims and offenders, the significant increases in both victims and offenders that are 18 and under have arguably been a greater motivating factor in increased law enforcement efforts. See *id.* at 226 tbl.32. More recently, however, the juvenile violent crime rate has been declining. See FBI, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1998, at 216 tbl.34 (1999) (showing a 19.2% decrease in the total number of juvenile arrests for violent crime during the five-year period of 1994-1998).

³ For a discussion of various policy initiatives addressing the problem of juvenile crime, see OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE RE-

the various measures policymakers have adopted are juvenile curfews, designed to keep the youth off the streets during the small hours of night.⁴ Despite good intentions, juvenile curfew laws raise serious constitutional concerns. Courts have treated juvenile curfews with equal levels of applause and disdain, thus leaving communities across the country with little guidance to enact constitutionally valid curfews.⁵ In 1993, however, the Fifth Circuit decided a case which allegedly heralded the archetypal curfew statute that could withstand constitutional scrutiny.⁶ In *Qutb v. Strauss*, the Fifth Circuit upheld a Dallas, Texas juvenile curfew ordinance under strict constitutional scrutiny in the face of an equal protection challenge.⁷ Viewing *Qutb* as the decisive analysis, countless towns across the country enacted curfew laws using the Dallas ordinance as their drafting benchmark.⁸

FORM INITIATIVES IN THE STATES: 1994-1996 (1997) [hereinafter REFORM INITIATIVES: 1994-1996]. The report addresses the following issues: crime prevention, curfews, parental responsibility, gang activities, graduated sanctions, juvenile boot camps, youth and guns, juvenile records, juvenile waivers, and expanded sentencing authority. See *id.* at 9-48. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is one of the five program bureaus operating under the aegis of the Office of Justice Programs within the Department of Justice. See OFFICE OF THE FED. REGISTER, U.S. GOV'T MANUAL 1997/1998, at 353-56 (1997). The OJJDP, along with the Bureau of Justice Assistance, Bureau of Justice Statistics, National Institute of Justice, and the Office for Victims of Crime, "provide[s] Federal leadership, coordination, and assistance needed to make the Nation's justice system more efficient and effective." *Id.* at 353. OJJDP maintains an excellent website at <<http://www.ojjdp.ncjrs.org>>. The site offers access to information and resources on Juvenile Justice programs and includes an on line publication request function.

⁴ Juvenile curfews vary from jurisdiction to jurisdiction. Generally, they contain provisions that prohibit minors under the age of 17 from remaining in public between 11:00 P.M. to 6:00 A.M. on weekdays and from 12:01 A.M. to 6:00 A.M. on weekends. In addition, curfews generally contain exceptions for activities such as traveling with a parent, returning from a school function, and engaging in interstate travel and First Amendment activities. The breadth of the exceptions has a direct bearing on the constitutionality of a curfew. See, e.g., D.C. CODE ANN. §§ 6-2182 to 6-2183 (Supp. 1999); DALLAS, TEX., CITY CODE § 31-33 (1961); CHARLOTTESVILLE, VA., CODE § 17-7 (1996); SAN DIEGO, CAL., MUNICIPAL CODE art. 8 § 58.01 (repealed 1997). While a large majority of states define "juvenile" as a person below the age of 18, some variation exists. For a summary of state definitions, see HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 73 (1995) [hereinafter OJJDP NATIONAL REPORT]. For purposes of this Note, any reference to "juvenile" includes individuals within the purview of juvenile curfew statutes, regardless of how a particular jurisdiction defines "juvenile."

⁵ Compare *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1258 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision) (upholding a juvenile curfew under rational review), with *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072-74 (5th Cir. Unit A Oct. 1981) (striking down a juvenile curfew as unconstitutionally overbroad).

⁶ See *Qutb v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993) (concluding that the Dallas ordinance "furthers a compelling state interest" and is sufficiently "narrowly tailored").

⁷ See *id.* at 496.

⁸ See Brian J. Lester, Comment, *Is It Too Late for Juvenile Curfews? Qutb Logic and the Constitution*, 25 HOFSTRA L. REV. 665, 697 (1996) ("After the *Qutb* decision, cities across the country enacted curfew ordinances mirroring the Dallas curfew ordinance."); Mark Potok, *Cities Deciding That It's Time for Teen Curfews*, USA TODAY, June 6, 1994, at 3A; see also Kim

Despite the seemingly settled outlook after the *Qutb* decision, several recent cases have reexamined the constitutional underpinnings of juvenile curfews and questioned the appropriate analytical treatment. Consider the following three circuit court decisions: In the 1997 case of *Nunez v. City of San Diego*,⁹ the Ninth Circuit unanimously struck down a juvenile curfew ordinance under strict scrutiny. In the 1998 case of *Hutchins v. District of Columbia*,¹⁰ the D.C. Circuit struck down the city's juvenile curfew in a decision illustrating the immense confusion concerning the appropriate level of constitutional scrutiny. In *Hutchins*, each of the three circuit judges applied a different level of constitutional scrutiny, with two voting to strike it down.¹¹ The D.C. Circuit vacated the opinion and granted a rehearing en banc,¹² in which a plurality reversed the charted course and upheld the constitutionality of the D.C. curfew.¹³ Finally, in the 1998 case of *Schleifer v. City of Charlottesville*, the Fourth Circuit upheld a juvenile curfew under intermediate scrutiny in a two-to-one decision.¹⁴ The Supreme Court recently denied certiorari in *Schleifer*,¹⁵ marking the third time the Court has declined to review the constitutionality of juvenile curfews.¹⁶ Each denial of certiorari has let stand a lower court determination based upon a different standard of review.

Although the curfews in *Nunez*, *Hutchins* and *Schleifer* were structurally similar to the *Qutb* ordinance, the courts' treatment and results were markedly varied.¹⁷ Judicial confusion over the proper analytical treatment stems in large part from the Supreme Court's view of the rights of minors. The Court has been loathe to accord minors rights coextensive with those of adults, and on several prior occasions has explicitly compromised the fundamental rights of school-age children.¹⁸ To complicate matters further, plaintiffs have brought curfew

Webster, *After Midnight: Curfew Lacks Major Impact on Youth Crime*, TULSA WORLD, Jan. 8, 1999, at D1 (noting that "75 percent of U.S. cities with populations of 100,000 or more have some type of night time curfew for minors").

⁹ 114 F.3d 935, 951 (9th Cir. 1997).

¹⁰ 144 F.3d 798 (D.C. Cir. 1998), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999).

¹¹ *See id.* at 809, 826.

¹² *See Hutchins v. District of Columbia*, 156 F.3d 1267 (D.C. Cir. 1998) (per curiam).

¹³ *See Hutchins*, 188 F.3d at 531.

¹⁴ 159 F.3d 843, 852 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999) ("Thus, [the Charlottesville curfew] would survive even strict scrutiny if that were the appropriate standard of review.").

¹⁵ *See Schleifer*, 119 S. Ct. at 1252.

¹⁶ The other two times the Supreme Court denied certiorari were in *Bykofsky v. Borough of Middletown*, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision), *cert. denied*, 429 U.S. 964 (1976) and *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 511 U.S. 1127 (1994).

¹⁷ For a discussion of the particulars of each case, including a comparison of the differences between each of the curfews, see *infra* Part III.

¹⁸ *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) ("[U]nemancipated minors lack some of the most fundamental rights of self-determination—including even

challenges under various doctrinal theories, including vagueness and overbreadth, equal protection, and substantive and procedural due process.¹⁹ Consequently, this confusion has led to a pervasive lack of doctrinal uniformity and, not surprisingly, a split in authority. The Second and Ninth Circuits have held that specific juvenile curfews violated the constitutional rights of minors,²⁰ while the Third, Fourth, Fifth and D.C. Circuits have held that other curfew laws were valid under the state's general police power.²¹

This Note will address the constitutional parameters of juvenile curfew laws and propose a uniform doctrinal analysis for adjudication of constitutional claims. Part I briefly explores the origins, purpose, and development of curfew laws generally, and surveys the seminal federal cases dealing with juvenile curfew challenges. Part II discusses the application of Supreme Court standards in determining whether the constitutional rights of minors are to be treated equally with those of adults. Part III discusses the constitutional implications of *Hutchins*, *Nunez*, and *Schleifer*, and how these cases highlight the systematic lack of doctrinal uniformity in constitutional adjudication of juvenile curfews. Part IV endeavors to reconcile these recent decisions with the constitutional foundations of the *Quib* model and Supreme Court jurisprudence addressing the rights of minors. Finally, Part V argues

the right of liberty in its narrow sense, *i.e.*, the right to come and go at will."); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976) ("The Court . . . long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. It remains, then, to examine whether there is any significant state interest in [imposing the restriction] that is not present in the case of an adult." (citations omitted)); *Ginsberg v. New York*, 390 U.S. 629, 636 (1968) ("Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." (quoting *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71, 75 (1966)) (internal quotation marks omitted)). *But see Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.").

¹⁹ See, *e.g.*, *Hutchins v. District of Columbia*, 144 F.3d 798, 816 (D.C. Cir. 1998) (striking down curfew as violative of equal protection and due process rights), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072-74 (5th Cir. Unit A Oct. 1981) (striking down juvenile curfew solely on the basis of overbreadth); *Naprstek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976) (invalidating juvenile curfew under vagueness doctrine for failing to establish curfew cutoff time); *Waters v. Barry*, 711 F. Supp. 1125, 1137-38 (D.D.C. 1989) (holding curfew unconstitutional under equal protection, while rejecting challenge based on Fourth Amendment right to freedom from unreasonable search and seizure).

²⁰ See *Hutchins*, 144 F.3d at 816; *Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997); *Naprstek*, 545 F.2d at 818.

²¹ See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 850-51 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999); *Quib*, 11 F.3d at 496; *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1257-58 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision).

that courts should apply intermediate scrutiny in analyzing the constitutionality of juvenile curfew laws. This Part argues that intermediate scrutiny is fair, workable, and consistent with Supreme Court jurisprudence adjudicating the rights of minors.

I

HISTORY AND DEVELOPMENT OF CURFEW LAWS

An abundance of existing literature details the origins and evolution of curfew laws.²² This Note differs in three fundamental ways. First, this Note analyzes juvenile curfews as they stand today, in light of the *Nunez*, *Hutchins*, and *Schleifer* decisions. Second, it takes a principled look at how courts have treated juvenile curfews and ventures to clarify the import of their decisions. Finally, it argues that applying intermediate scrutiny is both legally supportable and practically viable. Nevertheless, a cursory review of the older case law and literature is helpful in cultivating a sense of perspective and understanding of the unique contours of contemporary challenges to juvenile curfews.

A. Curfew Development in the United States

Curfew laws have been utilized in a variety of contexts and circumstances throughout our country's history.²³ For example, prior to the Civil War, legislators in the South used curfews to keep African Americans off the streets during certain hours of the night.²⁴ Since the early 1900s, policymakers have used curfews in attempts to control

²² See, e.g., Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315 (1995) (examining the constitutionality of juvenile curfews under different rights theories); Susan M. Horowitz, *A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances*, 24 COLUM. J.L. & SOC. PROBS. 381, 415 (1991) (arguing for recognition of a "compelling for children" category of state interests, within the framework of strict scrutiny); Sam R. Hananel, Recent Development, *Qutb v. Strauss*, *The Fifth Circuit Upholds a Narrowly Tailored Juvenile Curfew Ordinance*, 69 TUL. L. REV. 308 (1994) (criticizing the Fifth Circuit's decision in *Qutb v. Strauss*); Martin E. Mooney, Note, *Assessing the Constitutional Validity of Juvenile Curfew Statutes*, 52 NOTRE DAME LAW. 858 (1977) (arguing that strict scrutiny is the appropriate constitutional standard of review); Note, *Juvenile Curfew Ordinance Does Not Violate Constitutional Rights of Minors*, 54 TEX. L. REV. 812 (1976) (criticizing the decision in *Bykofsky v. Borough of Middletown*); Note, *Juvenile Curfew Ordinances and the Constitution*, 76 MICH. L. REV. 109, 152 (1977) [hereinafter *Juvenile Curfew Ordinances*] (arguing that "carefully drafted, sensibly administered" juvenile curfews are constitutional).

²³ For a discussion of the origins of curfew laws, see Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66, 66 n.5 (1958) [hereinafter *Curfew Ordinances*]. Curfews have been traced back in English history to the times of William the Conqueror. See *id.*; see also *Thistlewood v. Trial Magistrate*, 204 A.2d 688, 690-91 (Md. 1964) (briefly detailing the history of curfews).

²⁴ See Peter L. Scherr, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163, 164-66 (1992) (summarizing different applications of the curfew).

vagrancy.²⁵ During the 1960s and 1970s, authorities imposed emergency curfews to temper race riots.²⁶ Communities have even utilized curfews as a means to govern access to public parks.²⁷ During World War II, the Supreme Court sanctioned the imposition of curfews on Japanese-American citizens for purposes of national security.²⁸ Unlike juvenile curfews, courts have almost uniformly upheld emergency curfews,²⁹ justifying them on grounds of exigent circumstances.³⁰ Furthermore, emergency curfews are generally limited in scope, duration, and application.³¹

In contrast to generalized curfews applicable to all persons, juvenile curfews are prevalent in our nation's cities.³² Curfews have long been considered an effective means of controlling juvenile crime.³³ One of the earliest enactments of a juvenile curfew came at the turn of the century, motivated by the perception that immigrant parents

²⁵ See *Guidoni v. Wheeler*, 230 F. 93, 96-97 (9th Cir. 1916) (upholding a curfew restricting vagrancy by unemployed persons after 11:00 P.M.). But see *Ruff v. Marshall*, 438 F. Supp. 303, 306 (M.D. Ga. 1977) (striking down curfew which prohibited loitering in public places of business after business hours).

²⁶ See *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971) (upholding curfew stemming out of race riots); *Glover v. District of Columbia*, 250 A.2d 556, 560-61 (D.C. 1969) (same); *Ervin v. State*, 163 N.W.2d 207, 210-12 (Wis. 1968) (same).

²⁷ See, e.g., *Peters v. Breier*, 322 F. Supp. 1171, 1172 (E.D. Wis. 1971) (upholding public park curfew applicable to all persons).

²⁸ See *Yasui v. United States*, 320 U.S. 115, 117 (1943) (upholding curfew aimed at citizens of Japanese ancestry under emergency war powers); *Hirabayashi v. United States*, 320 U.S. 81, 104-05 (1943) (same); *Ex parte Ventura*, 44 F. Supp. 520, 523 (W.D. Wash. 1942) (upholding a curfew restricting Japanese-Americans from leaving their homes between 8:00 P.M. and 6:00 A.M.).

²⁹ See Kevin C. Siebert, Note, *Nocturnal Juvenile Curfew Ordinances: The Fifth Circuit "Narrowly Tailors" a Dallas Ordinance, But Will Similar Ordinances Encounter the Same Interpretation?*, 73 WASH. U. L.Q. 1711, 1719-20 (1995) ("[C]ourts have almost uniformly upheld emergency curfews premised on state or federal emergency police powers . . ."). But cf. John F. Dienelt, Note, *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560 (1968) (arguing that riot curfews should be subject to a "strict necessity" test); Glenn C. Frese, Comment, *The Riot Curfew*, 57 CAL. L. REV. 450 (1969) (arguing that curfews are justified in exigent circumstances, but cautioning against their abuse).

³⁰ See Tona Trollinger, *The Juvenile Curfew: Unconstitutional Imprisonment*, 4 WM. & MARY BILL RTS. J. 949 (1996). Professor Trollinger, a former ACLU attorney who served as plaintiffs' counsel for the challenge in *Quth*, writes:

In contrast [to generalized juvenile curfews], the emergency curfew is by definition more narrowly tailored in scope. It is enacted to meet a specific, short-term exigency, and is limited spatially and temporally to the scope of the exigency. Emergency curfews address[] the extraordinary ramifications of such natural and human-made disasters as riots, extreme disorderly conduct, hurricanes, earthquakes, and war, and typically [are] predicated on a continuing declaration of a state of emergency.

Id. at 954-56 (citations omitted).

³¹ See *id.*

³² See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN: CURFEW: AN ANSWER TO JUVENILE DELINQUENCY AND VICTIMIZATION? 9 (1996) [hereinafter 1996 JUVENILE JUSTICE BULLETIN].

³³ See *Curfew Ordinances*, *supra* note 23, at 66 n.5 (providing a brief history of curfews).

were not adequately supervising their children.³⁴ The popularity of the juvenile curfew diminished thereafter, but reemerged during the World War II era.³⁵ With many parents actively engaged in the war effort, juvenile control became a significant problem.³⁶ After the war, however, juvenile crime continued to increase, spurring further interest in juvenile curfews.³⁷ Since then, the political penchant for juvenile curfews has closely traced the historical ebb and flow of juvenile crime.³⁸

In recent years, the juvenile curfew has again become a popular legislative device in the fight against juvenile crime, particularly in the context of gang violence.³⁹ Proponents of juvenile curfew laws argue that curfews serve three essential functions: (1) reducing juvenile crime, (2) protecting against juvenile victimization, and (3) assisting parental supervision.⁴⁰ These rationales are often explicitly stated in the "legislative purpose" sections of juvenile curfew ordinances.⁴¹

Opponents of juvenile curfews attack them on numerous grounds. First, opponents argue that such measures would undoubtedly be unconstitutional as applied to adults.⁴² Even though only a small proportion of youths engage in violent behavior, juvenile curfews effectively restrict the rights of all youths within a defined age group.⁴³ Second, opponents argue that the connection between juvenile curfew laws and crime reduction is tenuous at best, as reflected in

³⁴ See *id.*

³⁵ See Siebert, *supra* note 29, at 1719.

³⁶ See *Curfew Ordinances*, *supra* note 23, at 66-67 n.5.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See Gregory Z. Chen, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131, 134 (1997) ("During the past decade . . . local concerns about juvenile violence and gang-related activity have rekindled interest in curfews directed primarily at youth activity."). But see Note, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 HARV. L. REV. 1693, 1709 (1994) [hereinafter *Juvenile Curfews and Gang Violence*] ("[E]ven with the protection of judicial review, curfews remain a limited and inadequate response to the problems of gangs."). Discussion of other anti-gang measures, such as stop-and-search policies, road blocks, drug sweeps, and gang profiling, is beyond the scope of this Note. For a discussion of these issues, see Jonathan Hangartner, Comment, *The Constitutionality of Large Scale Police Tactics: Implications for the Right of Intrastate Travel*, 14 PACE L. REV. 203 (1994) (discussing police "sweep" tactics).

⁴⁰ See, e.g., Jeremy Toth, Note, *Juvenile Curfew: Legal Perspectives and Beyond*, 14 IN PUB. INTEREST 39, 81-82 (1994-95) (arguing in favor of utilizing juvenile curfews to control the emergency status of juvenile crime).

⁴¹ See, e.g., D.C. CODE ANN. § 6-2181(e)(1)-(3) (Supp. 1999); DALLAS, TEX., CITY CODE § 31-33 (1960); CHARLOTTESVILLE, VA., CODE § 17-7 (1996); .

⁴² See *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 965 (1976), *denying cert.* to 535 F.2d 1245 (3d Cir. 1976), *aff'g* 401 F. Supp. 1242 (M.D. Pa. 1975) (Marshall, J., dissenting) ("[A]bsent a genuine emergency, a curfew aimed at all citizens could not survive constitutional scrutiny." (citations omitted)).

⁴³ See REFORM INITIATIVES: 1994-1996, *supra* note 3, at 3 ("[L]ess than one-half of 1 percent of juveniles in the Nation were arrested for a violent offense in 1994.")

statistics which indicate that juvenile crime peaks during the after-school hours.⁴⁴ Third, opponents argue that curfews do not treat the causes of juvenile crime, but rather treat the symptoms.⁴⁵ In other words, methods which are more effective and less restrictive than generalized juvenile curfews exist for reducing juvenile crime and victimization.⁴⁶ Finally, opponents argue that curfew enforcement diverts scarce resources from efforts to combat more serious crimes.⁴⁷

State courts entertained the earliest juvenile curfew challenges and continue to serve as the forum for certain cases.⁴⁸ State court challenges are equally as varied as the federal cases and illustrate

⁴⁴ See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 26 (1997) [hereinafter 1997 UPDATE ON VIOLENCE].

⁴⁵ See REFORM INITIATIVES: 1994-1996, *supra* note 3, at 14-15.

⁴⁶ See *infra* Part V.B for a discussion of alternative measures of juvenile crime control.

⁴⁷ See *Juvenile Curfews and Gang Violence*, *supra* note 39, at 1699.

⁴⁸ The earliest state cases upholding the validity of juvenile curfews include the following: *People v. Walton*, 161 P.2d 498, 501-03 (Cal. 1945) (upholding curfew under state and federal constitutions); *Thistlewood v. Trial Magistrate*, 204 A.2d 688 (Md. 1964) (upholding validity of four-day Labor Day weekend curfew applicable to persons under 21 years of age); and *Baker v. Steelton Borough*, 17 Dauphin County Rep. 17 (Pa. C. 1912) (rejecting equal protection challenge brought under the Fourteenth Amendment). Later cases upholding the validity of juvenile curfews include the following: *In re Appeal in Maricopa County*, 887 P.2d 599, 609-11 (Ariz. App. 1994) (holding curfew was not unconstitutionally broad or vague); *In re Nancy C.*, 105 Cal. Rptr. 113 (Cal. Ct. App. 1972) (upholding curfew and following *People v. Walton*); *In re J.M.*, 768 P.2d 219, 222-23 (Colo. 1989) (finding that minors' rights are not coextensive with those of adults in upholding juvenile curfew); *Village of Deerfield v. Greenberg*, 550 N.E.2d 12, 14-15 (Ill. App. Ct. 1990) (rejecting contention that village ordinance impermissibly conflicted with state legislation because the ordinance was more expansive); *People v. Chambers*, 360 N.E.2d 55 (Ill. 1976) (upholding statewide juvenile curfew despite challenges under free speech, assembly and association grounds); *People v. Smith*, 276 N.W.2d 481, 483-84 (Mich. Ct. App. 1979) (holding that occurrence of an investigatory stop of a youthful-looking 19-year old is not sufficient grounds to invalidate juvenile curfew); *City of Eastlake v. Ruggiero*, 220 N.E.2d 126 (Ohio Ct. App. 1966) (upholding juvenile curfew as necessary policy regulation); and *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 340 (Wis. 1988) (holding that a juvenile curfew which prohibited minors from "congregating" in public areas during curfew hours was not unconstitutionally vague).

The earliest state cases invalidating juvenile curfews include the following: *Ex parte McCarver*, 46 S.W. 936 (Tex. Crim. App. 1898) (invalidating curfew because it infringes on the rights of minors and usurps the parental function); and *Alves v. Justice Court*, 306 P.2d 601 (Cal. Ct. App. 1957) (invalidating juvenile curfew under state and federal constitutions). Later cases invalidating curfews include: *S.W. v. State*, 431 So. 2d 339 (Fla. Dist. Ct. App. 1983) (invalidating curfew in part because of the potential for selective enforcement of a special emergency permit exception); *In re Doe*, 513 P.2d 1385 (Haw. 1973) (invalidating juvenile curfew under vagueness and overbreadth); *Allen v. City of Bordentown*, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987) (striking down a juvenile curfew as a denial of equal protection and as unconstitutionally vague); *In re Michael G.*, 416 N.Y.S.2d 1016 (N.Y. Fam. Ct. 1979) (holding that police lacked authority to arrest juveniles for curfew violations because the village lacked statutory authority); *In re Mosier*, 394 N.E.2d 368 (Ohio Ct. C. P. 1978) (invalidating curfew under equal protection, holding that differential application to high school graduates and non-graduates has no rational basis); and *City of Seattle v. Pullman*, 514 P.2d 1059 (Wash. 1973) (invalidating curfew for unconstitutional vagueness).

many of the same doctrinal questions surrounding juvenile rights.⁴⁹ On the federal level, the seminal case adjudicating the constitutionality of juvenile curfews is *Bykofsky v. Borough of Middletown*.⁵⁰

B. The U.S. Supreme Court Denies Certiorari: *Bykofsky v. Borough of Middletown*

In *Bykofsky v. Borough of Middletown*, a mother and her twelve-year-old son challenged the juvenile curfew enacted by Middletown, a rural Pennsylvania town.⁵¹ The U.S. District Court for the Middle District of Pennsylvania upheld the ordinance under rational review.⁵² The Third Circuit affirmed the decision without opinion, and the U.S. Supreme Court denied certiorari.⁵³ Justice Marshall dissented from denial of certiorari, arguing that if the town had aimed the curfew at the general population, the courts would undoubtedly strike the law down.⁵⁴ The underlying issue governing the case, Justice Marshall wrote, "is whether the due process rights of juveniles are entitled to lesser protection than those of adults."⁵⁵ Precisely this question continues to haunt the constitutional parameters of juvenile curfews⁵⁶ and foreshadowed the significance of the Supreme Court's decision in *Bellotti v. Baird*, discussed in Part II.

1. *District Court Proceedings in Bykofsky*

Although the Supreme Court declined to review the decision in *Bykofsky*, the district court opinion crystallizes many of the issues that bear on the juvenile curfew's constitutionality. Specifically, the opinion lays out the doctrinal questions that remain sources of confusion and controversy. Plaintiffs challenged the curfew on numerous grounds: (1) vagueness; (2) the First Amendment freedom of speech,

⁴⁹ See, e.g., Frank DeLucia, Comment, *Connecticut's Juvenile Curfew Ordinances: An Effective Means for Curbing Juvenile Crime, or an Unconstitutional Deprivation of Minors' Fundamental Rights?*, 15 QUINNIPIAC L. REV. 357 (1995) (examining state and federal juvenile curfew cases and arguing that similar ordinances in Connecticut are unconstitutional); Susan L. Freitas, Note, *After Midnight: The Constitutional Status of Juvenile Curfew Ordinances in California*, 24 HASTINGS CONST. L.Q. 219 (1996) (examining juvenile curfews under federal and California laws); Natalie M. Williams, Comment, *Updated Guidelines for Juvenile Curfews: City of Maquoketa v. Russell*, 79 IOWA L. REV. 465 (1994) (examining a decision of the Iowa Supreme Court and arguing for its use as a model for future drafting).

⁵⁰ 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision), *cert. denied*, 429 U.S. 964 (1976).

⁵¹ See *id.* at 1242.

⁵² See *id.* at 1256.

⁵³ See *Bykofsky*, 535 F.2d at 1245.

⁵⁴ See *Bykofsky*, 429 U.S. at 965 (Marshall, J., dissenting).

⁵⁵ *Id.* at 965 (Marshall, J., dissenting) (footnote omitted).

⁵⁶ See *id.* at 965, 966 (Marshall, J., dissenting) ("I believe this case poses a substantial constitutional question . . . which is of importance to thousands of towns with similar ordinances." (citation omitted)).

association, and assembly; (3) the due process right to freedom of movement; (4) the fundamental right of interstate travel; (5) the constitutional right of intrastate travel; (6) the parents' constitutional right to control their child's upbringing; and (7) equal protection.⁵⁷ The opinion addresses each of the plaintiffs' claims separately.

First, the district court found that parts of the ordinance were unconstitutionally vague.⁵⁸ The court found that certain phrases, such as "normal . . . night-time activities,"⁵⁹ were not defined with sufficient clarity to provide fair warning and notice of prohibited activity.⁶⁰ However, the court utilized the curfew's severability clause to delete the problematic phrases and thus saved the curfew from constitutional infirmity.⁶¹ Second, the district court addressed the substantive due process claim, noting that "[t]he Supreme Court has not yet articulated the special factors that determine how existing frameworks for analyzing the rights of adults are to be applied to minors."⁶² The district court surveyed Supreme Court jurisprudence addressing the rights of minors⁶³ and concluded that minors' rights are not coextensive with those of adults.⁶⁴ Because the ordinance did not implicate a fundamental right or suspect classification, the district court concluded that rational review was the appropriate standard.⁶⁵ In applying this standard, the court found that the curfew advanced "the purposes for which it was enacted" and hence passed constitutional muster.⁶⁶

Third, with respect to the First Amendment overbreadth claim, the court rejected the plaintiffs' claim on three grounds: (1) the ordinance contained an exception for First Amendment activities; (2) the notice provision in the ordinance was less restrictive than parade-li-

⁵⁷ See *Bykofsky*, 401 F. Supp. at 1248.

⁵⁸ See *id.* at 1250.

⁵⁹ *Id.*

⁶⁰ See *id.*; see also *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939) (invalidating on vagueness grounds a state statute that made it a criminal offense to be a gangster, which included in its definition someone "known to be a member" of a gang).

⁶¹ See *Bykofsky*, 401 F. Supp. at 1250-52. The Middletown ordinance states in relevant part:

Construction. Severability is intended throughout and within the provisions of the Curfew Ordinance. If any provision, including inter alia any exception, part, phrase or term, or the application thereof to any person or circumstance is held invalid, the application to other persons or circumstances shall not be affected thereby and the validity of the Curfew Ordinance in any and all other respects shall not be affected thereby.

MIDDLETOWN, PA., CODE OF ORDINANCES, CH. VI, § 9 (1975).

⁶² *Bykofsky*, 401 F. Supp. at 1253.

⁶³ See *id.* at 1253-54.

⁶⁴ See *id.* at 1254; see also *infra* Part II.B (discussing cases that analyze the constitutional rights of minors).

⁶⁵ See *Bykofsky*, 401 F. Supp. at 1256, 1264.

⁶⁶ *Id.* at 1256.

censing requirements that the U.S. Supreme Court upheld in *Cox v. New Hampshire*,⁶⁷ and (3) important governmental interests advanced in the ordinance outweighed the incidental limitations on the minor's First Amendment right to associate for social purposes.⁶⁸

In addressing the fourth claim—violation of the right to interstate travel—the court noted the Middletown curfew contained an exception which ensured “that the ordinance in no way impinges on the right to interstate travel.”⁶⁹ Fifth, the court rebuffed the plaintiff's intrastate travel argument, holding that, “[f]or the reasons set forth previously in the substantive due process section, . . . the governmental interests furthered by the curfew ordinance override[] the minor's constitutional right to intrastate travel.”⁷⁰

With regard to the plaintiffs' sixth claim, based on the parental right to determine their children's upbringing, the court first noted that these rights, while constitutionally protected, are not absolute.⁷¹ The court concluded that this right, “upon which the ordinance infringes only minimally, is outweighed by [Middletown's] interest in protecting immature minors and in controlling and preventing nocturnal juvenile mischief and crime.”⁷²

Finally, with regard to the equal protection claim, the court noted that age itself is not a suspect classification.⁷³ Because the ordinance did not infringe upon a fundamental right or implicate a suspect classification, the district court held that heightened review was not warranted and upheld the curfew under rational review.⁷⁴ Subsequent cases adjudicating juvenile curfews built on the analysis used in *Bykofsky*. Although the juvenile curfew in *Bykofsky* contained certain constitutional safeguards to ward off vagueness and overbreadth challenges, subsequent curfews failed to follow its teachings.

⁶⁷ 312 U.S. 569 (1941) (upholding content-neutral municipal ordinance that required a permit for parades and public meetings).

⁶⁸ See *Bykofsky*, 401 F. Supp. at 1258-60. See *infra* Part IV.B.2 for a discussion of the First Amendment exception to juvenile curfews.

⁶⁹ *Id.* at 1261. One of the curfew's exceptions reads as follows:

When the minor is, with parental consent, in a motor vehicle. This contemplates normal travel. From excess of caution, this clearly exempts bona fide interstate movement through Middletown, particularly on normal routes such as the Pennsylvania Turnpike, Route 230 (Main Street) . . . This also exempts interstate travel beginning or ending in Middletown.

MIDDLETOWN, PA., CODE OF ORDINANCES, ch. VI, § 5(j) (1975) (emphasis added).

⁷⁰ *Bykofsky*, 401 F. Supp. at 1261; see also *infra* Part IV.B.1 (explaining various approaches to reviewing a claim of a right to intrastate travel).

⁷¹ See *Bykofsky*, 401 F. Supp. at 1262.

⁷² *Id.* at 1264.

⁷³ See *id.* at 1265.

⁷⁴ See *id.* at 1266.

2. *Post-Bykofsky, Pre-Qutb Juvenile Curfew Cases*

After *Bykofsky*, only four federal cases examined juvenile curfews until the 1993 Fifth Circuit decision of *Qutb*.⁷⁵ Three of these decisions, however, are of limited utility in the current discussion, because the invalidations were based on defects easily cured by legislative revision. Their usefulness lies primarily in focusing the sources of doctrinal confusion plaguing juvenile curfew adjudication. More specifically, these decisions have clarified the constitutional dividing line for adjudication under the overbreadth and vagueness doctrines.⁷⁶ Consequently, as the fourth of these cases illustrates, doctrinal confusion gravitates toward equal protection and substantive due process.

The first federal juvenile curfew case to arise after *Bykofsky* was *Naprstek v. City of Norwich*.⁷⁷ In *Naprstek*, the Second Circuit struck down a juvenile curfew on vagueness grounds.⁷⁸ The court found that the Norwich statute's failure to define the hour of termination for the curfew "renders the ordinance susceptible to arbitrary, capricious and erratic enforcement, and therefore it is unconstitutional in its application."⁷⁹

In the second case, *Johnson v. City of Opelousas*,⁸⁰ the U.S. District Court for the Western District of Louisiana upheld the city's curfew law, rejecting the standard-fare constitutional challenges.⁸¹ The Fifth Circuit reversed, however, striking down the juvenile curfew under the overbreadth doctrine due to its lack of exceptions.⁸² The curfew applied to minors under seventeen and contained only two exceptions: (1) accompaniment by a parent and (2) emergency errand.⁸³ The court expressed concern over the scope of prohibited behavior, noting that none of the prior federal cases dealt with curfew laws that "encompassed nearly the breadth of the Opelousas ordinances."⁸⁴ Consequently, the court struck down the ordinance, though it "ex-

⁷⁵ See *McColleston v. City of Keene*, 668 F.2d 617 (1st Cir. 1982); *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. Unit A Oct. 1981); *Naprstek v. City of Norwich*, 545 F.2d 815 (2d Cir. 1976); *Waters v. Barry*, 711 F. Supp. 1125 (D.D.C. 1989).

⁷⁶ See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (delineating the contours of the overbreadth doctrine).

⁷⁷ 545 F.2d 815, 818.

⁷⁸ See *id.* at 818.

⁷⁹ *Id.*

⁸⁰ 488 F. Supp. 433 (W.D. La. 1980), *rev'd*, 658 F.2d 1065 (5th Cir. Unit A Oct. 1981).

⁸¹ The court rejected the plaintiffs' challenges based on the First, Fifth, and Fourteenth Amendments. The court did, however, strike a portion of the ordinance as impermissibly vague, but utilized the curfew's severability clause to save the ordinance from constitutional infirmity. See *id.* at 440-44. This approach is consistent with *Bykofsky*. See *supra* notes 58-61 and accompanying text.

⁸² See *Johnson*, 658 F.2d at 1074.

⁸³ See *id.* at 1067 n.1.

⁸⁴ *Id.* at 1071.

pressly limited [its holding] to the unconstitutional overbreadth of the ordinance."⁸⁵

In *McColleston v. City of Keene*,⁸⁶ the third case in the series, the U.S. District Court for the District of New Hampshire invalidated the city's juvenile curfew.⁸⁷ Although the court rejected the plaintiffs' vagueness claim,⁸⁸ it struck down the curfew under the overbreadth doctrine.⁸⁹ Specifically, the court noted that the curfew lacked exceptions for interstate travel, emergency errands, and activity on a neighbor's property.⁹⁰ The District Court stated that the curfew "restricts the rights of parents and their minor children . . . substantial[ly] and without the state interest necessary to justify such [an] intrusion."⁹¹ The plaintiffs' victory, however, was short-lived. On ap-

⁸⁵ *Id.* at 1074.

⁸⁶ 514 F. Supp. 1046 (D.N.H. 1981), *rev'd*, 668 F.2d 617 (1st Cir. 1982).

⁸⁷ On July 3, 1980, the city of Keene enacted a juvenile curfew which prohibited persons under 16 from remaining in public after 9:00 P.M. unless accompanied by a parent, guardian, or other suitable person. *See id.* at 1047. Two weeks later, the city extended the curfew to 10:00 P.M. *See id.* After suit was filed, the city amended the curfew as follows:

1. That the curfew which goes into effect at 10:00 PM each evening in Keene shall end at 5:00 AM on the following morning.
2. That the curfew shall apply to the persons under the age of 16 years who are not accompanied by a parent or legal guardian or by another person over the age of 18 years authorized or approved by the child's parent or guardian.
3. That 'public place' be defined as parks, playgrounds, schoolyards, governmental building yards, vacant lots, municipal parking lots and parking lots open to the public (such as parking lots of supermarkets, restaurants, movie theaters and other places of public accommodation).
4. That 'public street' be defined as streets, sidewalks, and private ways open to public use.
5. That the curfew shall be inapplicable to those persons under the age of 16 years who shall be en route to or from the following:
 1. A place of his or her employment,
 2. A restaurant, library, movie theater, store or other place of public accommodation,
 3. A play, dance, sporting event or other event of public entertainment,
 4. A church, meeting hall, school, courthouse or other place of public assembly or worship.

Except, however, in the case of public employment, the above exception for travel shall not excuse any person under the age of 16 years from the curfew beyond 12:00 midnight.

6. That 'being' on a public street or in a public way shall include being in or on a motor vehicle.

Keene, N.H., Resolution 81-4A (Feb. 5, 1981).

⁸⁸ *See McColleston*, 514 F. Supp. at 1049 ("The ordinance as written provides adequate and fair warning of the prohibited conduct and does not place unfettered discretion in the hands of either enforcement officials or judges and juries.").

⁸⁹ *See id.* at 1053 ("[We are] compelled to strike down this ordinance because it unduly overburdens minors' rights and does not fit within the state's interests validated by *Bellotti*. . ."); *see infra* Part II.A (describing the *Bellotti* decision).

⁹⁰ *See McColleston*, 514 F. Supp. at 1052.

⁹¹ *Id.* at 1053.

peal, the First Circuit reversed the district court's decision on jurisdictional grounds.⁹² The court found no actual "case or controversy" capable of adjudication; the complaint "failed to allege the conduct in which the plaintiff intended to engage," or any real risk of "direct injury from enforcement of the [ordinance]."⁹³

Finally, *Waters v. Barry*⁹⁴ involved a challenge to the juvenile curfew enacted by the District of Columbia.⁹⁵ The *Waters* opinion is significant for two reasons. First, it brings the due process and equal protection issues back to the forefront of judicial attention.⁹⁶ In its analysis, the court stressed the importance of a minor's fundamental right of freedom of movement and found that a restriction of this right warranted strict scrutiny.⁹⁷ The court explicitly disagreed with *Bykofsky's* conclusion that states may give less deference to minors' constitutional rights and found that the curfew was not narrowly tai-

⁹² See *McColleston v. City of Keene*, 668 F.2d 617, 621-22 (1st Cir. 1982).

⁹³ *Id.* at 620 ("An allegation as to what the plaintiff personally intends to do is necessary to show that not only she but also her intended conduct are at least plausibly within the potential reach of the statute or ordinance.").

⁹⁴ 711 F. Supp. 1125 (D.D.C. 1989).

⁹⁵ The D.C. curfew in effect at the time of *Waters* read, in pertinent part:

- (a) The Council of the District of Columbia ("Council") imposes a curfew on minors in the District of Columbia ("District") between the hours of 11:00 p.m. and 6:00 a.m. each day, except that on Friday and Saturday evenings the curfew shall commence at 11:59 p.m. ("curfew hours").
- (b) It shall be unlawful for a parent knowingly to permit or, by negligent failure to exercise reasonable control, allow his or her minor child to remain on any street, sidewalk, park, or other outdoor public place within the District during the curfew hours.
- (c) It shall be unlawful for any minor to remain in or upon any street, sidewalk, park, or other outdoor public place in the District during the curfew hours.
- (d) This section shall not apply:
 - (1) When a minor is accompanied by a parent;
 - (2) When a minor is returning home by way of a direct route from an activity that is sponsored by an educational, religious, or non-profit organization. . .
 - (3) When a minor is traveling in a motor vehicle;
 - (4) When a minor is acting within the scope of legitimate employment . . . and the minor has in his or her possession a copy of a valid work or theatrical permit or an affidavit from the employer; or
 - (5) When, due to reasonable necessity:
 - (A) A minor who is a custodial parent is engaged in an emergency errand that is directly related to the health or safety of his or her child and the minor describes the nature of the health or safety emergency; or
 - (B) A minor is engaged in an emergency errand and the minor has in his or her possession, if practicable, a written statement signed by the parent

District of Columbia, Temporary Curfew Emergency Act of 1989, No. 8-325 (Apr. 14, 1989). For the current juvenile curfew in effect, see D.C. CODE ANN. § 6-2182 to 6-2183 (Supp. 1999).

⁹⁶ See *Waters*, 711 F. Supp. at 1134-37, 1138-40.

⁹⁷ See *id.* at 1135.

lored to serve its compelling interest of crime reduction.⁹⁸ Consequently, the court invalidated the D.C. curfew, finding that it violated the plaintiffs' equal protection and substantive due process rights.⁹⁹ Second, the court analyzed the curfew under the Fourth Amendment's guarantee to freedom from unreasonable search and seizure.¹⁰⁰ The court rejected this Fourth Amendment challenge, holding that the detention and arrest of youthful-looking violators who could not produce documentation did not render the curfew unconstitutional.¹⁰¹

Naprstek, *Johnson*, *McColleston*, and *Waters* further refine the issues that *Bykofsky* enunciated several years earlier.¹⁰² Specifically, they define the constitutional boundaries of juvenile curfews under vagueness, overbreadth, and Fourth Amendment jurisprudence. As illustrated in *Waters*, however, substantive due process and equal protection challenges remain controversial.

C. The Fifth Circuit Upholds Juvenile Curfew Under Strict Scrutiny: *Quth v. Strauss*

In *Quth v. Strauss*, the Fifth Circuit upheld a Dallas, Texas, juvenile curfew ordinance under strict scrutiny.¹⁰³ The ordinance prohibited persons under the age of seventeen from remaining in a public place between the hours of 11:00 P.M. and 6:00 A.M., Sunday through Thursday, and between 12:01 A.M. and 6:00 A.M. on Friday and Saturday. The ordinance, however, contained numerous exceptions.¹⁰⁴

⁹⁸ See *id.* at 1136-37 (applying the due process balancing test under *Bellotti* and concluding that "the Act does not justify differentiating between the constitutional rights of minors and adults").

⁹⁹ See *id.* at 1137-39.

¹⁰⁰ See *id.* at 1137-38.

¹⁰¹ See *id.*

¹⁰² See *supra* Part I.B.1.

¹⁰³ 11 F.3d 488, 496 (5th Cir. 1993).

¹⁰⁴ See DALLAS, TEX., CITY CODE § 31-33 (1961). The ordinance contained the following exceptions:

- (A) accompanied by the minor's parent or guardian;
- (B) on an errand at the direction of the minor's parent or guardian, without any detour or stop;
- (C) in a motor vehicle involved in interstate travel;
- (D) engaged in an employment activity, or going to or returning home from an employment activity, without any detour or stop;
- (E) involved in an emergency;
- (F) on the sidewalk abutting the minor's residence or abutting the residence of a next-door neighbor if the neighbor did not complain to the police department about the minor's presence;
- (G) attending an official school, religious, or other recreational activity supervised by adults and sponsored by the city of Dallas, a civic organization, or another similar entity that takes responsibility for the minor, or going to or returning home from, without any detour or stop, an official school, religious, or other recreational activity supervised by

Viewing the decision as a victory in the fight against juvenile crime, numerous towns across the country enacted curfew laws similar to the one upheld in *Quth*.¹⁰⁵

In challenging the Dallas ordinance, the plaintiffs asserted numerous constitutional challenges: violation of their First Amendment rights of free speech and association, violation of their Fourth Amendment privilege against unreasonable search and seizure, violation of Fourteenth Amendment equal protection and due process rights, and violation of the vagueness and overbreadth doctrines.¹⁰⁶ The district court found the ordinance unconstitutional under equal protection and free association grounds, but did not address plaintiffs' other claims.¹⁰⁷

The Fifth Circuit reviewed the case *de novo*.¹⁰⁸ The court analyzed the curfew under both the equal protection and due process doctrines, proceeding on the assumption that the right to move about freely was a fundamental right.¹⁰⁹ Consequently, the court reviewed the curfew under strict scrutiny, whereby the ordinance must promote a compelling governmental interest and be narrowly tailored in order to be constitutional.¹¹⁰ With respect to the first prong, the Fifth Circuit was in accord with other courts in finding that the city's interest in reducing juvenile crime and victimization was compelling.¹¹¹ The second prong of the court's strict scrutiny analysis, however, was more troubling.

In support of the narrow-tailoring requirement, the city presented data indicating that the total number of juvenile arrests in Dallas had increased from 1989 to 1990 and that violent offenses for

adults and sponsored by the city of Dallas, a civic organization, or another similar entity that takes responsibility for the minor;

(H) exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, and the right of assembly; or

(I) married or had been married or had disabilities of minority removed in accordance with Chapter 31 of the Texas Family Code.

Id. § 31-33(c)(1).

¹⁰⁵ See *supra* note 8 and accompanying text.

¹⁰⁶ See *Quth*, 11 F.3d at 491 n.4.

¹⁰⁷ See *id.* at 491 n.5.

¹⁰⁸ See *id.* at 491.

¹⁰⁹ See *id.* at 492. The court did not actually decide this matter, but rather stated that "[f]or purposes of our analysis, we assume without deciding that the right to move about freely is a fundamental right." *Id.*

¹¹⁰ See *id.*

¹¹¹ See *id.* In view of *Bellotti v. Baird*, discussed *infra* Part IIA, the Fifth Circuit recognized that in some instances, the rights of minors may be treated differently than those of adults. The Fifth Circuit, however, determined that *Bellotti* applied to only the first prong of the equal protection analysis. See *Quth*, 11 F.3d at 492 n.6. Because all parties agreed that the state interest was compelling, the court found it "unnecessary to conduct a full *Bellotti* analysis." *Id.*

all persons (including adults) were most likely to occur during the hours the curfew would be in effect.¹¹² The plaintiffs argued, however, that the city failed to show whether a curfew would have an effect on the juvenile crime problem.¹¹³ Specifically, the plaintiffs asserted that the city did not provide data on juvenile crime and victimization during curfew hours, thus failing to show that the problems were nocturnal.¹¹⁴ The court responded in a footnote, noting that the federal judiciary "do[es] not demand of legislatures scientifically certain criteria of legislation."¹¹⁵ Ultimately, the court found that the city presented sufficient data to pass strict constitutional scrutiny.¹¹⁶ Even without precise data the court held that the city had employed the "least restrictive means of accomplishing its goals."¹¹⁷ Instead of focusing on the efficacy of the juvenile curfew laws, the court focused on the breadth of exceptions afforded by the Dallas ordinance.¹¹⁸ The Fifth Circuit contrasted the Dallas ordinance with the one invalidated for overbreadth in *Johnson*¹¹⁹ and found that the Dallas ordinance rectified any constitutional infirmities contained in the Opelousas ordinance.¹²⁰

The decisions in *Qutb* and the preceding cases had some commentators beckoning for Supreme Court guidance.¹²¹ However, the Supreme Court denied certiorari in *Qutb*, marking the second time the Court let stand a lower court decision upholding the validity of a

¹¹² See *Qutb*, 11 F.3d at 493.

¹¹³ See *id.* See *infra* Part IV.A.2 for a discussion of these evidentiary defects.

¹¹⁴ See *Qutb*, 11 F.3d at 493; see also Trollinger, *supra* note 30, at 958 ("[T]he city failed to provide precise data to support its curfew, offering only anecdotal evidence and incomplete and noncomparative reports of juvenile crime and victimization." (footnote omitted)).

¹¹⁵ *Qutb*, 11 F.3d at 493 n.7 (quoting *Ginsberg v. New York*, 390 U.S. 629, 642 (1968)). For commentary questioning whether such information constitutes a demand for "scientifically certain" data, see Hananel, *supra* note 22, who asserts:

[T]he plaintiffs' arguments that the city must supply proof that the ordinance would affect the juvenile crime problem is hardly a demand for "scientifically certain" data. In fact, none of the data provided by the city actually revealed the number of juvenile victims or perpetrators of crimes during the curfew hours.

Id. at 317 (footnote omitted).

¹¹⁶ See *Qutb*, 11 F.3d at 494.

¹¹⁷ *Id.* at 493.

¹¹⁸ See *id.* at 493-94 ("To be sure, the defenses are the most important consideration in determining whether this ordinance is narrowly tailored.").

¹¹⁹ See *supra* notes 80-85 and accompanying text.

¹²⁰ See *Qutb*, 11 F.3d at 494 ("By including the defenses to a violation of the ordinance, the city has enacted a narrowly drawn ordinance that allows the city to meet its stated goals while respecting the rights of the affected minors." (footnote omitted)).

¹²¹ See, e.g., Scott A. Kizer, Note, *Juvenile Curfew Laws: Is There a Standard?*, 45 *DRAKE L. REV.* 749 (1997) (arguing that the Supreme Court should grant certiorari to resolve any outstanding questions regarding the proper doctrinal analysis for juvenile curfews).

juvenile curfew.¹²² Consequently, some commentators have argued that *Quib* will continue to serve as the constitutional benchmark for valid juvenile curfews, absent a stricter state constitutional standard.¹²³ Others, however, maintain "that the *Quib* ruling is not as reliable as some cities may have originally perceived."¹²⁴

II

CONSTITUTIONAL RIGHTS OF MINORS: DETERMINING THE APPROPRIATE LEVEL OF SCRUTINY FOR ADJUDICATING JUVENILE CURFEW CHALLENGES

The constitutionality of juvenile curfews is predicated on the threshold question of whether the rights of minors are coextensive with those of adults.¹²⁵ While case law and commentary have long held that children are entitled to constitutional protections,¹²⁶ minors' rights are not equal to those of adults.¹²⁷ Competing interests of individual freedom and state regulation require sensitive balancing which sometimes compromises the rights of minors. In adjudicating juvenile curfews, courts have applied three standards of review: strict scrutiny, intermediate scrutiny, and rational review.¹²⁸

When a challenged regulation implicates a suspect class or impinges on a fundamental right, courts apply strict scrutiny.¹²⁹ In applying this standard, courts will uphold a regulation only if it is

¹²² See *Quib v. Bartlett*, 511 U.S. 1127 (1994); *Bykofsky v. Borough of Middletown*, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision), *cert. denied*, 429 U.S. 964 (1976).

¹²³ See, e.g., Craig M. Johnson, Comment, *It's Ten O'Clock: Do You Know Where Your Children Are?* *Quib v. Strauss and the Constitutionality of Juvenile Curfews*, 69 ST. JOHN'S L. REV. 327, 362 (1995) ("Future state court decisions that may invalidate curfews should not diminish the importance of *Quib*, where these curfews were either drafted more broadly than the Dallas ordinance or were evaluated under more protective state laws."); Siebert, *supra* note 29, at 1717-18 ("[U]ntil a federal court overturns a similar curfew, the Dallas ordinance will persist as a benchmark for cities across the country." (footnote omitted)).

¹²⁴ Lester, *supra* note 8, at 697.

¹²⁵ See *Bykofsky*, 429 U.S. at 965 (Marshall, J., dissenting) ("The question squarely presented by this case, then, is whether the due process rights of juveniles are entitled to lesser protection than those of adults." (footnote omitted)).

¹²⁶ See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." (citations omitted)).

¹²⁷ See Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1163 (1984) [hereinafter *Assessing Minors' Rights*] ("Although there is no longer any doubt that children are 'persons' under our Constitution' who possess 'fundamental rights which the State must respect,' it is also clear that the rights of children are not coextensive with those of adults." (footnote omitted)).

¹²⁸ *But cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (arguing that the types of scrutiny that the Court has applied actually reveal a "spectrum of standards" rather than one of tiers).

¹²⁹ See *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (striking down a Texas statute that withheld state funds from local school districts for children who did not lawfully enter the United States).

narrowly tailored to serve a compelling state interest.¹³⁰ Absent a suspect class or infringement of a fundamental right, a regulation need only pass rational review; in other words, the regulation must show a rational relationship between its means and stated objectives.¹³¹ The third standard of review, intermediate scrutiny, has been applied to quasi-suspect classifications, such as gender and illegitimacy.¹³² In order to pass muster under this standard, the regulation must be substantially related to important governmental objectives.¹³³ In the context of juvenile curfews, however, mere articulation of a standard does not determine the validity of the measure.¹³⁴ The question, then, is when and under what circumstances should the courts treat the rights of minors with lesser scrutiny than those of adults? Because age itself is not a suspect classification,¹³⁵ the inquiry turns into an analysis of fundamental rights. The Supreme Court case of *Bellotti v. Baird*¹³⁶ may have shed some light on whether the rights of juveniles can be subject to greater curtailment than those of adults.¹³⁷

A. *Bellotti v. Baird*: Determining a Juvenile's Right to Abortion Access

Bellotti involved a challenge to a state abortion-access regulation requiring parental consent or judicial approval for a pregnant minor seeking an abortion.¹³⁸ In upholding the regulation, the Court outlined three factors that enable courts to determine whether a state has a compelling interest justifying greater restrictions on minors than on adults: (1) "the peculiar vulnerability of children"; (2) "their inability to make critical decisions in an informed, mature manner"; and (3) "the importance of the parental role in child rearing."¹³⁹ The Court addressed each of these elements individually, implying that the test

¹³⁰ See *id.* at 217.

¹³¹ See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (upholding the constitutionality of a state cap on welfare benefits to families, regardless of family size or need).

¹³² See *infra* Part V.A for a discussion of the intermediate scrutiny standard.

¹³³ See *Craig v. Boren*, 429 U.S. 190, 210 (1976) (invalidating on equal protection grounds an Oklahoma statute that prohibited sale of certain alcohol to males aged 18 to 20, but not females of the same age).

¹³⁴ But cf. Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 175 (1984) ("The *a priori* labels ascribed to governmental and individual interests tend to preordain their constitutional fate.").

¹³⁵ See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) ("This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause." (citations omitted)).

¹³⁶ 443 U.S. 622 (1979).

¹³⁷ Cf. Chen, *supra* note 39, at 159-73 (arguing that courts should focus on the different alignments of interests among the parent, child, and state to determine a minor's rights in the context of juvenile curfews).

¹³⁸ See *Bellotti*, 443 U.S. at 625-26.

¹³⁹ *Id.* at 634.

could be satisfied by any of the three prongs, rather than requiring a cumulative inquiry.¹⁴⁰

Despite the teachings of *Bellotti*, courts adjudicating juvenile curfews have not applied the criteria with any degree of uniformity. Indeed, a lower court's view of the *Bellotti* criteria has been critical in determining the level of scrutiny applied.¹⁴¹ The cases can be roughly summarized as follows: One group of cases has applied the *Bellotti* framework to conclude that courts should not diminish juvenile rights.¹⁴² A second group has applied *Bellotti* to find that minors are peculiarly vulnerable at night and that their rights are therefore not coextensive with adults.¹⁴³ Still a third group has held that while certainly relevant, *Bellotti* must be viewed in light of other Supreme Court jurisprudence adjudicating the rights of minors.¹⁴⁴ Finally, some judges have chosen not to use the framework at all.¹⁴⁵ In view of the confusion regarding *Bellotti*'s import, several questions arise: Is *Bellotti* the stand-alone test for determining whether minors' rights should have lesser protection? Should *Bellotti* be limited to its facts? Or should courts view it as relevant in light of Supreme Court jurisprudence dealing with the rights of minors?

By its terms, *Bellotti* does not explicitly embrace juvenile curfew challenges, but *Bellotti*'s broad language can fairly be read in such a manner.¹⁴⁶ On the other hand, some commentators have suggested limiting *Bellotti*'s import to cases involving parental consent for abor-

¹⁴⁰ See *id.* at 634-39.

¹⁴¹ See *infra* Part III for a discussion on how different courts have applied *Bellotti*.

¹⁴² See, e.g., *Hutchins v. District of Columbia*, 144 F.3d 798, 825 (D.C. Cir. 1998) (Tatel, J., concurring) (applying strict scrutiny and arguing that decreasing scrutiny simply on the basis of age is not warranted), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999); *Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997) ("The *Bellotti* test does not establish a lower level of scrutiny for the constitutional rights of minors in the context of a juvenile curfew."); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. Unit A Oct. 1981) (finding that *Bellotti* factors do not lessen the standard of review); *Waters v. Barry*, 711 F. Supp. 1125, 1136-37 (D.D.C. 1989) (same).

¹⁴³ See, e.g., *Hutchins*, 144 F.3d at 809 (Rogers, J.) (applying intermediate scrutiny) ("Viewed in light of factors deemed to be significant in both *Carey* and *Bellotti*, juvenile curfews arise in a context in which children are more vulnerable than adults" (citations omitted)); *Schleifer v. City of Charlottesville*, 963 F. Supp. 534, 542 (W.D. Va. 1997) ("[T]he *Bellotti* factors justify a less stringent standard of review in this case.").

¹⁴⁴ See, e.g., *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998) (declining to utilize *Bellotti*'s three-part test, but rather viewing the case in context with other juvenile jurisprudence), *cert. denied*, 119 S. Ct. 1252 (1999).

¹⁴⁵ See, e.g., *Hutchins*, 188 F.3d at 531 (Silberman, J.) (applying rational review); *McColleston v. City of Keene*, 586 F. Supp. 1381, 1386 (D.N.H. 1984) (noting that *Bellotti* "do[es] not come into play where the innocent behavior of the juvenile creates no risk of delinquent activity").

¹⁴⁶ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults").

tion.¹⁴⁷ Whatever the extent of its influence, it is important to note three things about *Bellotti*. First, *Bellotti* was a four-justice plurality opinion decided over twenty years ago.¹⁴⁸ Hence, it remains unclear whether the articulated three-prong framework would command a majority today. Second, the decision does not exist within a vacuum, but rather as part of the larger framework of Supreme Court jurisprudence adjudicating the rights of minors. Indeed, the *Bellotti* decision itself relied on other Supreme Court cases which recognized that juvenile rights were sometimes equal to those of adults and other times they were not.¹⁴⁹ Hence, it would be reasonable to examine *Bellotti*'s foundations to assess its present significance. Third, the *Bellotti* tripartite test has proven unworkable and inconsistent, as illustrated by the confusion engendered in the lower courts. Consequently, *Bellotti* is certainly relevant, but it cannot be the stand-alone test for determining whether or when the courts and legislators can treat the fundamental rights of minors as lesser than those of adults.¹⁵⁰ The next section examines cases relevant to *Bellotti*'s foundations.

B. Other Cases Analyzing the Constitutional Rights of Minors

The Supreme Court has examined the rights of minors vis-à-vis adults under a myriad of fact patterns and circumstances. For example, the Court has firmly established that a minor has the following rights: the right to counsel,¹⁵¹ notice of charges,¹⁵² the right to cross-examine witnesses,¹⁵³ and the privilege against self-incrimination.¹⁵⁴ Furthermore, minors are entitled to protection against double jeopardy,¹⁵⁵ as well as the requirement of proof beyond a reasonable doubt in delinquency proceedings involving acts parallel to adult

¹⁴⁷ See Toth, *supra* note 40, at 58 ("The *Bellotti* court was deciding a highly controversial issue, an issue having nothing to do with juvenile curfews.")

¹⁴⁸ Justice Powell delivered the opinion of the Court, in which Chief Justice Burger, Justice Stewart, and Justice Rehnquist joined. See *Bellotti*, 443 U.S. at 622. Justices Stevens, Brennan, Marshall, and Blackmun concurred in the judgment only. See *id.* at 652. Justice White filed a dissenting opinion. See *id.* at 656.

¹⁴⁹ See *id.* at 633-39.

¹⁵⁰ See Horowitz, *supra* note 22, at 416 (arguing that courts should not use *Bellotti* "as a talismanic device to determine the constitutionality of a juvenile curfew ordinance").

¹⁵¹ See *In re Gault*, 387 U.S. 1, 41 (1967) (concluding that the Due Process Clause requires notification of both parents and child as to the child's right to counsel).

¹⁵² See *id.* at 33 (concluding that due process requires notice of charges in juvenile process).

¹⁵³ See *id.* at 56 (requiring that juvenile court testimony be subject to cross-examination, unless the juvenile has made a valid confession).

¹⁵⁴ See *id.* at 55 (concluding that the privilege against self-incrimination applies to juveniles as it does to adults).

¹⁵⁵ See *Breed v. Jones*, 421 U.S. 519, 541 (1975) (holding that a juvenile court adjudication of delinquency bars subsequent trial as an adult for the same offense).

crimes.¹⁵⁶ Conversely, however, the law withholds from juveniles some due process rights it grants to adults. For instance, a minor in juvenile proceedings does not have a constitutional right to a jury trial¹⁵⁷ or indictment by a grand jury.¹⁵⁸ Viewed from a broader perspective, the very existence of a separate juvenile justice system evinces an assumption that "juvenile offenders constitutionally may be treated differently from adults."¹⁵⁹

The juvenile justice system is not the only arena in which minors receive differential treatment. For example, even though the right to vote is considered a fundamental right,¹⁶⁰ the right does not vest constitutionally until a person reaches the age of eighteen.¹⁶¹ The Supreme Court has established that states can also set reasonable age requirements in the "general interest [of a] youth's well being."¹⁶² Accordingly, states have set age restrictions for the driving privilege,¹⁶³ the purchase of alcohol,¹⁶⁴ and employment.¹⁶⁵ In the recent

¹⁵⁶ See *In re Winship*, 397 U.S. 358, 368 (1970) (concluding that the standard of proof beyond a reasonable doubt is constitutionally required in delinquency proceedings).

¹⁵⁷ See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). The Supreme Court's decision that a jury trial is not constitutionally required in juvenile proceedings was based in part on the reasoning that such a requirement would "reinake the juvenile proceeding into a fully adversary process . . . put[ting] an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.*

¹⁵⁸ See *Kent v. United States*, 383 U.S. 541, 555 (1966) (holding that the juvenile was entitled to a hearing before a waiver of juvenile court jurisdiction to criminal court was considered valid).

¹⁵⁹ *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). For an excellent overview of the juvenile justice system, see OJJDP NATIONAL REPORT, *supra* note 4, at 69-95.

¹⁶⁰ See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (striking down a poll tax as violative of the Equal Protection Clause).

¹⁶¹ See U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."). The amendment overturned the Supreme Court's decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), which struck down portions of a federal statute to the same effect as unconstitutional.

¹⁶² *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (upholding the conviction of a Jehovah's Witness for allowing a child in her custody to sell literature in violation of a child labor law).

¹⁶³ For examples of age restrictions on the driving privilege, see CAL. VEH. CODE §§ 12509, 12814.6 (West Supp. 1999); D.C. CODE ANN. § 40-301 (1981); LA. REV. STAT. ANN. § 32:405.1 (West Supp. 1999); N.H. REV. STAT. ANN. § 263:16 (1993); N.Y. VEH. & TRAF. LAW § 502 (McKinney 1996 & Supp. 1999); 75 PA. CONS. STAT. ANN. § 1503 (West Supp. 1999); TEX. TRANSP. CODE ANN. § 521.201 (West 1999); and VA. CODE ANN. § 46.2-334 (Michie Supp. 1998).

¹⁶⁴ Most jurisdictions prohibit the sale of alcohol to individuals under the age of 21. See, e.g., CAL. BUS. & PROF. CODE § 25658 (West Supp. 1999); D.C. CODE ANN. § 25-121 (1981); LA. REV. STAT. ANN. § 26:286 (West Supp. 1999); N.H. REV. STAT. ANN. § 179:5 (Supp. 1999); N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 1996 & Supp. 1999); 18 PA. CONS. STAT. ANN. § 6310.1 (West Supp. 1999); TEX. ALCO. BEV. CODE ANN. §§ 106.01-106.14 (West 1995 & Supp. 1999); VA. CODE ANN. § 4.1-304 (Michie 1999).

¹⁶⁵ See, e.g., CAL. LAB. CODE §§ 1285-1312 (West 1989 & Supp. 1999); D.C. CODE ANN. § 36-501 (1981); LA. REV. STAT. ANN. §§ 23:166-63, 23:166 (West 1998); N.H. REV. STAT. ANN. § 276-A:4 (1999); N.Y. LAB. LAW § 130 (McKinney 1996 & Supp. 1999); PA. STAT. ANN.

Supreme Court case of *Vernonia School District 47J v. Acton*, involving a challenge to random drug testing of school athletes, the Court held that "at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will."¹⁶⁶ Given the restrictions on movement in the case of juvenile curfews, this language appears extremely relevant on its face. The language has surfaced in several decisions addressing the constitutionality of juvenile curfews.¹⁶⁷ However, context dictates caution in using the aforementioned language in that manner. The issues implicated in *Vernonia* centered around the Fourth Amendment right to be free from unreasonable search and seizure, as applied to the states through the Fourteenth Amendment.¹⁶⁸ *Vernonia* made no mention whatsoever of the equal protection or due process doctrines.¹⁶⁹ Hence, the dicta in *Vernonia* provides little guidance for adjudicating the issues implicated by curfew restrictions.

Having considered existing statutory and judicial limitations on the rights of juveniles, the next Part will discuss three recent circuit court cases adjudicating juvenile curfew challenges.

III

CURRENT STATE OF AFFAIRS: THREE RECENT CIRCUIT COURT DECISIONS

The preceding Parts set out the framework in which curfew adjudication occurs. This Part will illustrate that the judicial response to juvenile curfew challenges lacks doctrinal uniformity. The lack of uniformity has become even more pronounced as a result of *Hutchins*, *Nunez*, and *Schleifer*, intensifying an already accentuated split in federal authority. The ensuing Parts discuss these three circuit court decisions and analyze them in the context of older challenges.

A. *Hutchins v. District of Columbia*

Confusion over the appropriate level of scrutiny is manifest in the recent D.C. Circuit case of *Hutchins v. District of Columbia*.¹⁷⁰ Initially, a two-judge plurality struck down the District of Columbia's curfew,

tit. 43, § 44 (West 1992); TEX. LAB. CODE ANN. § 51.011 (West 1996); VA. CODE ANN. § 40.1-78 (Michie 1999).

¹⁶⁶ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

¹⁶⁷ See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999); *Hutchins v. District of Columbia*, 144 F.3d 798, 808 (D.C. Cir. 1998), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999).

¹⁶⁸ See 515 U.S. at 652-57.

¹⁶⁹ See *id. passim*.

¹⁷⁰ 144 F.3d 798 (D.C. Cir. 1998), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999) (*en banc*).

although the three judges disagreed on the appropriate level of scrutiny.¹⁷¹ In October 1998, however, the D.C. Circuit vacated the opinion upon the appellant's Suggestion for Rehearing en Banc.¹⁷² The resulting plurality decision upheld the constitutionality of D.C.'s curfew in an opinion underscoring the lack of uniformity within the federal judiciary.¹⁷³

In *Hutchins*, a group of minors under the age of seventeen, their parents, and a movie theater sued to enjoin enforcement of the Juvenile Curfew Act of 1995.¹⁷⁴ In challenging the ordinance, the parties asserted numerous constitutional violations: (1) the violation of Fifth Amendment equal protection; (2) the violation of due process right to free movement; (3) the violation of First Amendment rights to freedom of expression and assembly; (4) the violation of the vagueness and overbreadth doctrines; (5) the violation of the Fourth Amendment right to be free from unreasonable search and seizure; and (6) the violation of the due process right to autonomy in raising children.¹⁷⁵ The ordinance was modeled after the Dallas ordinance upheld by the Fifth Circuit in *Qutb* and contained many of the same exceptions.¹⁷⁶ The district court, however, enjoined enforcement of the curfew, finding that the Act violated the minors' fundamental right to free movement, as well as the parents' right to rear their children.¹⁷⁷ In applying the strict scrutiny standard, the district court found that the District of Columbia demonstrated a compelling state interest, but that the curfew was not narrowly tailored to serve that interest.¹⁷⁸

In its initial decision, the D.C. Circuit struck down the city's curfew as unconstitutional.¹⁷⁹ Judge Rogers held that the curfew trig-

¹⁷¹ See *id.* at 808, 826.

¹⁷² See *Hutchins v. District of Columbia*, 156 F.3d 1267 (D.C. Cir. 1998).

¹⁷³ See *Hutchins*, 188 F.3d 531 (D.C. Cir. 1999) (en banc).

¹⁷⁴ See D.C. CODE ANN. §§ 6-2182 to 6-2183 (1996).

¹⁷⁵ See *Hutchins*, 188 F.3d at 535.

¹⁷⁶ See *Hutchins*, 144 F.3d at 799 ("The [D.C.] Council modeled the Act on a Dallas, Texas, ordinance that the United States Court of Appeals for the Fifth Circuit had held was constitutional."); see also *supra* Part I.C.

¹⁷⁷ See *Hutchins v. District of Columbia*, 942 F. Supp. 665, 668 (D.D.C. 1996), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999).

¹⁷⁸ See *id.* at 674-80.

¹⁷⁹ See *Hutchins*, 144 F.3d at 817. Before addressing the merits of the case, the court had to determine whether the case had become moot, because all of the minors who challenged the ordinance had grown beyond the age of regulation. See *id.* at 802. The D.C. Circuit held that the primary challenges to the curfew were moot, because the appellees were not certified as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure. See *id.* at 802. The challenge survived, however, because the court ruled that an appellee parent with a minor child still subject to the curfew has standing to continue. See *id.* at 802. The movie theater which joined as co-plaintiff went bankrupt, and its cause was dismissed as moot. See *id.* at 802 n.6. See generally CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 13, at 79-81 (5th ed. 1994) (discussing the law of third-party standing).

gered intermediate scrutiny.¹⁸⁰ In applying this standard, Judge Rogers argued that the evidentiary flaws—the age-related and temporal defects in the statistics—failed to show that the curfew was “substantially related” to the District’s goals.¹⁸¹ Specifically, Judge Rogers noted that because youths aged seventeen or older were responsible for forty-two percent of the juvenile referrals from 1990 through 1994, a curfew which excluded this group “lacks a close fit to the goal of reducing juvenile crime.”¹⁸² Furthermore, the statistics offered by the District regarding violent teen deaths included youths aged fifteen through nineteen, thus failing to distinguish those youths that the curfew would not affect.¹⁸³ Consequently, the statistics “offer[ed] only weak evidence that the curfew will much reduce the teen violent death rate.”¹⁸⁴ Judge Tatel concurred in the judgment that the curfew failed to survive intermediate scrutiny, even though he believed that strict scrutiny was the appropriate standard of review, because the curfew implicated fundamental rights.¹⁸⁵ Judge Silberman dissented, arguing that rational review was the appropriate standard, because the curfew did not implicate fundamental rights.¹⁸⁶ A few months after the decision, the opinion was vacated upon the appellant’s Suggestion for Rehearing en Banc.¹⁸⁷

After a rehearing en banc, the D.C. Circuit reversed the district court’s grant of summary judgment and upheld the constitutionality of the city’s curfew.¹⁸⁸ Judge Silberman, who had previously dissented, wrote for a plurality of the en banc court.¹⁸⁹ Of the eleven sitting justices, four thought that rational review was the appropriate standard of review, six thought that intermediate scrutiny was appropriate, and one thought strict scrutiny should apply.¹⁹⁰ The confluence of various rationales and ideas regarding proper application of standards resulted in various coalitions of concurrences.

Judge Silberman divided his decision into four parts. Part I of Judge Silberman’s opinion was relatively unobjectionable, and simply discussed the nature of the curfew and the procedural posture of the case.¹⁹¹ Part II, however, was more controversial. In part II.A., Judge

¹⁸⁰ See *Hutchins*, 144 F.3d at 809 (“The approach reflected in the intermediate scrutiny test fits comfortably in examining the rights affected by juvenile curfews.”).

¹⁸¹ See *id.* at 811-17.

¹⁸² *Id.* at 814.

¹⁸³ See *id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *id.* at 825 (Tatel, J., concurring in judgment).

¹⁸⁶ See *id.* at 828 (Silberman, J., dissenting).

¹⁸⁷ See *Hutchins v. District of Columbia*, 156 F.3d 1267 (D.C. Cir. 1998) (per curiam).

¹⁸⁸ See *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999) (en banc).

¹⁸⁹ See *id.* at 534.

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 534-36.

Silberman held that the issue was whether the curfew infringes upon a fundamental right.¹⁹² In deciding whether a fundamental right was implicated, Judge Silberman framed the issue as whether minors have a right "to be on the streets at night without adult supervision," rather than one of freedom of movement.¹⁹³ Judge Silberman found that such a right did not exist.¹⁹⁴ Consequently, since no fundamental right had been infringed, rational review was the appropriate standard.¹⁹⁵

In part II.B., Judge Silberman further rejected the argument that the curfew infringes upon parents' substantive due process right to direct and control their children's upbringing.¹⁹⁶ Judge Silberman conceded that such rights may exist, but that they apply only to intimate family decisions and do not extend to allowing children on the streets at night.¹⁹⁷ Hence, parents' substantive due process rights were not implicated by the curfew. Notably, part II of Judge Silberman's opinion consisted of a four-judge minority; only Judges Williams, Sentelle, and Randolph joined in part II.¹⁹⁸

In view of the various concurrences, parts III and IV of Judge Silberman's opinion can be viewed as giving the most guidance regarding the D.C. Circuit's viewpoint. In addition to part II's four-judge minority, Judges Wald, Ginsberg, Henderson, and Garland joined in parts I, III, and IV.¹⁹⁹

In part III, Judge Silberman concluded that if the curfew did in fact implicate the fundamental rights of minors, then courts should apply intermediate scrutiny rather than strict scrutiny.²⁰⁰ In applying intermediate scrutiny, Judge Silberman found that the first prong—important governmental interest—was easily met: The juvenile violent crime arrest rate in D.C. was more than three times the national average; the violent death rate for teens aged fifteen to nineteen was four times the national average; and D.C. was ranked last in children's overall well being, almost three times worse than the worst state.²⁰¹

In applying the second prong—the substantial-relation requirement—Judge Silberman found that it too had been met. With regard to age-related evidentiary defects, the court questioned whether it was appropriate for the city to enact the curfew based on arrest statistics

192 See *id.* at 536.

193 *Id.* at 538.

194 See *id.*

195 See *id.* at 539.

196 See *id.* at 540.

197 See *id.* at 540-41.

198 See *id.* at 534.

199 See *id.*

200 See *id.* at 541.

201 See *id.* at 541-42.

that included seventeen-year olds and victimization statistics that covered fifteen- to nineteen-year olds.²⁰² The plaintiffs argued that their inclusion overstated the problem of juvenile crime.²⁰³ In response, however, the District submitted "more data showing that arrests for youths under [seventeen] have been increasing steadily."²⁰⁴ Consequently, the court held that the city was not wrong to exclude seventeen-year olds, thus making the curfew less intrusive than it could have been.²⁰⁵ With regard to potential time-dimension defects, the District submitted evidence which showed that "more than 50% of juvenile arrests took place during curfew hours."²⁰⁶ The court found that this evidence, coupled with the fact that serious crimes by all age groups were more likely to take place during curfew hours, demonstrated that the curfew was "substantially related" to its objectives.²⁰⁷ Similarly, the court quickly dispensed with arguments regarding the lack of data indicating where juvenile crime and victimization occur,²⁰⁸ arguments to limit the curfew to high-crime areas of the city,²⁰⁹ and arguments that the District was not entitled to rely on the experiences of other cities.²¹⁰

In part III.B, Judge Silberman concluded that the curfew, as far as it implicates the fundamental rights of parents, also "passes intermediate scrutiny because it is carefully fashioned much more to enhance parental authority than to challenge it."²¹¹ Specifically, the court held that "[t]he curfew's defenses allow the parents almost total discretion over their children's activities during curfew hours."²¹² Consequently, Judge Silberman held that the curfew survived intermediate scrutiny, because it was substantially related to an important governmental interest.

Finally, part IV of Judge Silberman's opinion addressed the vagueness challenges and categorically rejected each of the plaintiff's

²⁰² See *id.* at 543.

²⁰³ See *id.* at 542-43.

²⁰⁴ *Id.* at 543.

²⁰⁵ See *id.*

²⁰⁶ *Id.* at 544.

²⁰⁷ See *id.*

²⁰⁸ See *id.* (concluding that the fact "that the District did not produce data showing where juvenile crime and victimization occurred (i.e., that it occurred primarily outside of the home) [was] not problematic" and further "that a substantial percentage of violent juvenile victimizations (approximately 33%) occurred on the streets adequately supports the relationship between the government's interest and the imposition of the curfew").

²⁰⁹ See *id.* (noting that confining the curfew to high-crime areas "would have opened the Council to charges of racial discrimination").

²¹⁰ See *id.* ("[I]n drawing conclusions from . . . experiences [of other cities], legislatures are not obliged to insist on scientific methodology.").

²¹¹ *Id.* at 545.

²¹² *Id.*

arguments that the ordinance was impermissibly vague.²¹³ Most notably, with regard to the claim that the First Amendment exception was unconstitutionally vague, Judge Silberman wrote that "the curfew . . . is no more vague than the First Amendment itself."²¹⁴ The court also undertook to resolve the plaintiff's arguments based on the First and Fourth Amendments. Because the district court grounded its decision on equal protection and due process, it did not reach the First and Fourth Amendment claims.²¹⁵ Nevertheless, the D.C. Circuit "exercise[d] [its] discretion to resolve these purely legal claims in the interest of judicial economy."²¹⁶ In response to the First Amendment claim, the court held that "the First Amendment defense by definition provides full protection, [and] any residual deterrent caused by the curfew would pose at most an incidental burden on juveniles' expressive activity or right of association."²¹⁷ In response to the Fourth Amendment argument, the court held that the curfew's limitation on when an officer can make an arrest precisely followed the Supreme Court's definition of probable cause and was thus constitutional.²¹⁸

Chief Judge Edwards wrote a separate two-part opinion, concurring in part, and concurring in the result.²¹⁹ Judge Edwards argued that the curfew law "implicates significant rights of both minors and parents and, accordingly, is subject to no less than so-called 'intermediate scrutiny.'"²²⁰ Hence, Judge Edwards concurred in parts I, III.A and IV, and concurred in the result in part III.B. In part I of his concurrence, Judge Edwards disagreed with part II.B of Judge Silberman's opinion, which stated that parents' rights are limited to "intimate family decisions."²²¹ Judge Edwards stressed that parental rights have never been limited to "activities that take place literally inside the home or literally inside the classroom."²²² In part II of his concurrence, Chief Judge Edwards applied intermediate scrutiny and found that the curfew was "substantially related to the protection of minors from the dangers of juvenile crime."²²³ The primary issue,

²¹³ See *id.* at 546.

²¹⁴ *Id.*

²¹⁵ See *id.* at 547-48.

²¹⁶ *Id.*

²¹⁷ *Id.* at 548.

²¹⁸ See *id.*

²¹⁹ See *id.* (Edwards, C.J., concurring).

²²⁰ *Id.* (Edwards, C.J., concurring).

²²¹ *Id.* at 549 (Edwards, C.J., concurring).

²²² *Id.* at 550 (Edwards, C.J., concurring).

²²³ *Id.* at 551 (Edwards, C.J., concurring). Judges Wald and Garland joined in part II of Chief Judge Edwards's concurrence. Circuit Judges Wald and Garland wrote a brief one paragraph opinion concurring in part and concurring in the result. See *id.* at 552 (Wald, J., and Garland, J., concurring). They concluded that intermediate scrutiny was the appropriate standard for the reasons expressed in the *Schleifer* opinion, part II of Chief Judge Edwards's opinion, and part III of Judge Rogers's opinion. See *id.* (Wald, J., and Garland,

Judge Edwards argued, was whether the curfew "adequately accommodates parents' rights to determine what activities are necessary to their children's upbringing and growth."²²⁴ In view of the extensive exceptions, Judge Edwards determined that the D.C. curfew "adequately accommodates parents' rights, because, although parents' decision making is not unfettered, the law allows parents great discretion in how to manage the activities of their children."²²⁵

Judge Rogers, joined by Judge Tatel, wrote separately concurring in part and dissenting in part.²²⁶ Judge Rogers objected to Judge Silberman's characterization that the fundamental right at issue was whether minors have a right to be unaccompanied on the streets at night.²²⁷ Judge Rogers asserted that the right should be defined without regard to age, and without regard to how it is exercised.²²⁸ Judge Rogers argued that the right to intrastate travel was a fundamental right and that D.C.'s juvenile curfew impinged on this right, but because the curfew implicated the rights of minors, intermediate scrutiny should apply.²²⁹ In applying the standard, Judge Rogers argued that the requisite fit between means and ends was not present, because the legislature ignored evidence that almost half of juvenile crime is committed by persons not subject to the curfew and that most juvenile crime occurs at times outside the scope of curfew prohibition.²³⁰ Furthermore, the D.C. Council ignored evidence that "more than 90% of all juveniles do not commit any crimes, at night or otherwise."²³¹ Hence, these statistical defects rendered the evidence insufficient to withstand intermediate scrutiny.²³²

Judge Tatel wrote a separate dissent, agreeing with Judge Rogers that the curfew implicated the fundamental right of free movement.²³³ Although Judge Tatel believed that the court should apply strict scrutiny, he joined Judge Rogers's conclusion that the curfew failed to survive intermediate scrutiny.²³⁴ Judge Tatel focused on the parental right to upbringing and held that the issue was "not whether

J., concurring). Judges Wald and Garland also joined in parts III and IV of Silberman's plurality, which upheld the curfew under intermediate scrutiny and a vagueness challenge, respectively. *See id.* (Wald, J., and Garland, J., concurring).

²²⁴ *Id.* at 551 (Edwards, C.J., concurring).

²²⁵ *Id.* (Edwards, C.J., concurring).

²²⁶ *See id.* at 552 (Rogers, J., concurring in part, dissenting in part).

²²⁷ *See id.* (Rogers, J., concurring, in part, dissenting in part).

²²⁸ *See id.* at 557 (Rogers, J., concurring in part, dissenting in part).

²²⁹ *See id.* at 562-63 (Rogers, J., concurring in part, dissenting in part). Judges Wald and Garland concurred in the portion of Rogers's opinion which held that a fundamental right to intrastate travel exists. *See id.* at 552 (Wald, J., and Garland, J., concurring).

²³⁰ *See id.* at 553 (Rogers, J., concurring in part, dissenting in part).

²³¹ *Id.* at 566 (Rogers, J., concurring in part, dissenting in part).

²³² *See id.* at 553 (Rogers, J., concurring in part, dissenting in part).

²³³ *See id.* at 570-71 (Tatel, J., dissenting).

²³⁴ *See id.* at 571 (Tatel, J., dissenting).

the curfew . . . helps or hinders parental control . . . but rather whether the District has provided sufficient justification for imposing the particular restrictions on parental control to which these plaintiffs object."²³⁵ Judge Tatel concluded that "the method it chose so plainly lacks an evidentiary link to the stated goal that it fails the tailoring prong of both strict and intermediate scrutiny."²³⁶

Although the en banc decision ultimately upheld the constitutionality of the D.C. curfew, the decision-making process was anything but uniform. The following summarizes the confluence of the various opinions: Four judges concluded that rational review was the appropriate standard of review, arguing that no fundamental right was implicated by the curfew. Each of these judges also concluded, however, that the curfew would pass intermediate scrutiny, if that were the appropriate standard. On the other hand, a total of six judges believed that intermediate scrutiny was the appropriate standard of review. In applying the intermediate standard, the vote was five-to-one in favor of upholding the curfew. Finally, one judge argued that strict scrutiny was warranted, but that the curfew nevertheless failed even intermediate scrutiny. Consequently, we can glean from these numbers that the application of intermediate scrutiny by the various concurrences and rationales garnered a vote of nine-to-two in favor of upholding the curfew.

B. *Nunez v. City of San Diego*

Enacted in 1947, the juvenile curfew challenged in *Nunez v. City of San Diego*²³⁷ was not a recent legislative pronouncement.²³⁸ In April of 1994, however, the city precipitated this challenge by adopting a resolution for aggressive enforcement of the curfew due to increases in juvenile crime.²³⁹ The San Diego ordinance contained stricter prohibitions than other challenged curfews.²⁴⁰ For example, the curfew extended from 10:00 P.M. until daylight the following day, with no

²³⁵ *Id.* at 575 (Tatel, J., dissenting).

²³⁶ *Id.* (Tatel, J., dissenting).

²³⁷ 114 F.3d 935 (9th Cir. 1997).

²³⁸ *See id.* at 938. San Diego's curfew at the time of *Nunez*, read, in pertinent part: It shall be unlawful for any minor under the age of eighteen (18) years, to loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, wharves, docks, or other public grounds, public places and public buildings, places of amusement and entertainment, vacant lots or other unsupervised places, between the hours of ten o'clock P.M. and daylight immediately following . . .

SAN DIEGO, CAL., MUN. CODE art. 8 § 58.01 (1947) (repealed 1997).

²³⁹ *See Nunez*, 114 F.3d at 939.

²⁴⁰ *See supra* notes 103-06 and accompanying text for a comparison with the Dallas, Texas ordinance.

extension provision for weekends.²⁴¹ Arguably, weekend extension provisions undercut the rationale of guarding against youth crime and victimization, but such provisions also bear on the reasonableness of curfews and hence the likelihood that they will be upheld.²⁴²

The plaintiffs, several minors and their parents, brought a facial challenge to the San Diego curfew under 42 U.S.C. § 1983.²⁴³ The minor-plaintiffs alleged that the curfew restricted otherwise lawful activities, such as attending concerts, meeting with friends, and eating out.²⁴⁴ The parent-plaintiffs challenged the parental misdemeanor liability imposed by the curfew, alleging that the ordinance interfered with their parental right to rear their children.²⁴⁵ The district court granted summary judgment in favor of San Diego, concluding that the measure passed strict scrutiny.²⁴⁶ The ensuing appeal generated an enormous amount of interest, with over 100 California cities filing amicus briefs on behalf of San Diego.²⁴⁷

On appeal, the Ninth Circuit first examined the question of vagueness. The court held that San Diego's ordinance was flawed in two respects. First, it failed to provide reasonable notice of illegal conduct. Second, it gave police too much discretion to stop and arrest juveniles during curfew hours.²⁴⁸

The court rejected the city's arguments for a narrow construction to avoid these defects, but rather allowed a broader interpretation to address the constitutionality of the ordinance.²⁴⁹ In doing so, the

²⁴¹ See *SAN DIEGO, CAL., MUN. CODE* art. 8 § 58.01 (1947) (repealed 1997). Compare *Naprstek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976), in which the Second Circuit struck down a juvenile curfew on vagueness grounds for failure to specify a termination time. See *supra* notes 77-79 and accompanying text.

²⁴² See *Curfew Ordinances*, *supra* note 23, at 72 (criticizing the weekend extension provision as undermining the purpose of the curfew ordinance).

²⁴³ See *Nunez*, 114 F.3d at 939. Section 1983 reads, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). See generally *WRIGHT*, *supra* note 179, § 22A, at 132-40 (surveying the use of § 1983 as a tool for civil rights litigation); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 *CORNELL L. REV.* 482 (1982) (surveying § 1983 litigation).

²⁴⁴ See *Nunez*, 114 F.3d at 939.

²⁴⁵ See *id.*

²⁴⁶ See *id.*; *Nunez v. City of San Diego*, 963 F. Supp. 912, 923-24 (S.D. Cal. 1995).

²⁴⁷ See *Nunez*, 114 F.3d at 939 (noting that "[a]micus briefs in support of the City were filed by . . . 113 other California cities").

²⁴⁸ See *id.* at 943.

²⁴⁹ See *id.* at 943-44. Compare *Naprstek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976), discussed *supra* Part I.B.2, which held that a failure to specify the time a curfew ended each morning rendered the ordinance impermissibly vague, and thus unconstitu-

court noted that the "broader reading may make it more difficult for the statute to pass constitutional muster on substantive grounds, but it is required for the ordinance to meet the Constitution's guarantee of fair notice."²⁵⁰

Moving along to the equal protection challenges, the Ninth Circuit first noted that the right to freedom of movement is a fundamental right, thus triggering strict scrutiny.²⁵¹ In response to the city's argument that these rights are not fundamental for minors, the court found that *Bellotti* did not lessen the standard of scrutiny for minors' rights, but rather it "enables courts to determine whether the state has a compelling interest justifying greater restrictions on minors than on adults."²⁵² It further rejected the argument that the language in *Vernonia School District 47J v. Acton*,²⁵³ which suggested that minors lack the right to come and go at will, changed the nature of a minor's right to freedom of movement.²⁵⁴ Hence, the Ninth Circuit concluded strict scrutiny was the appropriate standard of review.²⁵⁵

In applying the strict scrutiny test, the court easily found that the city had a compelling interest in reducing juvenile crime and victimization.²⁵⁶ The court next considered whether the curfew met the narrow-tailoring requirement. Although the court expressed concern regarding the means-and-ends fit between the curfew and the proffered statistics, the court nevertheless did not invalidate it on those grounds.²⁵⁷ Instead, the court focused on the lack of exceptions. The ordinance allowed only four exceptions: (1) accompaniment by a parent or guardian; (2) emergency errand; (3) returning from a school sponsored activity; and (4) engagement in a legitimate business, trade or profession.²⁵⁸ The curfew had no exceptions for First Amendment activities or interstate travel.²⁵⁹ Moreover, the court noted that San Diego rejected proposed amendments "to tailor the ordinance more

tional. In *Nunez*, however, the court overlooked the vagueness issue and chose to address the merits of the case.

²⁵⁰ *Nunez*, 114 F.3d at 943-44.

²⁵¹ See *id.* at 944-45. For a discussion of whether the freedom of movement—intrastate travel—is a fundamental right, see *infra* Part V.B.1.

²⁵² *Nunez*, 114 F.3d at 945.

²⁵³ 515 U.S. 646 (1995).

²⁵⁴ See *Nunez*, 114 F.3d at 945 ("We decline to extend *Vernonia* to establish that the Constitution does not secure minors' fundamental right to free movement against the government acting without regard to the parents' wishes.").

²⁵⁵ See *id.* at 946.

²⁵⁶ See *id.* at 947.

²⁵⁷ See *id.* at 947-48.

²⁵⁸ See *id.* at 948-49. For a discussion of the contours of individual exceptions, see Part IV.B.

²⁵⁹ See *Nunez*, 114 F.3d at 948-49 for a discussion of the interstate travel exception to curfew regulation, see *infra* Part IV.B.1.

narrowly by adopting the broader exceptions used in . . . *Quth*.²⁶⁰ Consequently, the lack of exceptions served as the impetus for invalidating the curfew on the grounds that it restricted First Amendment rights and the parents' substantive due process right to control the upbringing of their children.²⁶¹

C. *Schleifer v. City of Charlottesville*

After conducting an extensive study, the City of Charlottesville, Virginia, enacted a new juvenile curfew ordinance in December 1996.²⁶² The ordinance appears more reasonable than the *Quth* model because of its less restrictive curfew hours.²⁶³ The curfew begins at 12:01 A.M. on Monday through Friday, and 1:00 A.M. on Saturday and Sunday, lifting at 5:00 A.M. each morning.²⁶⁴ Further, the curfew applies only to juveniles under the age of seventeen.²⁶⁵ The enumerated exceptions are essentially the same as those found in the Dallas ordinance challenged in *Quth*.²⁶⁶ Plaintiffs—five minors under the age of seventeen, one eighteen-year old, and two parents of minors—brought suit in federal district court seeking declaratory and injunctive relief, on the grounds that the juvenile curfew violated their constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments.²⁶⁷ The district court rejected the claims and upheld the curfew under intermediate scrutiny.²⁶⁸ Plaintiffs appealed to the Fourth Circuit.

In determining the appropriate level of scrutiny, a two-judge majority of the Fourth Circuit considered *Bellotti* as one of approximately a dozen cases providing a general analytical framework for determining the rights of minors; instead of applying *Bellotti's* three-prong test, the majority simply viewed it as relevant to the inquiry in the broader

²⁶⁰ *Nunez*, 114 F.3d at 948-49.

²⁶¹ *See id.* at 951. Shortly after the Ninth Circuit invalidated San Diego's curfew, the San Diego City Council enacted a new juvenile curfew law incorporating the *Quth* ordinance exceptions, *supra* note 104, almost verbatim. *See* SAN DIEGO, CAL., MUN. CODE art. 8 § 58.0102 (1997). Other revisions in the curfew include a change in the wording of the statute to prohibit a minor's "presen[ce] in any public place," and the addition of a definite termination time of 6:00 A.M. *Id.* The curfew, which continues to be applicable to minors under 18 years of age, remains in effect. *See id.*

²⁶² *See* CHARLOTTESVILLE, VA., CODE § 17-7 (1996).

²⁶³ *See supra* notes 103-24 and accompanying text.

²⁶⁴ *See* CHARLOTTESVILLE, VA., CODE § 17-7 (1996).

²⁶⁵ The phrase "under the age of 17" has been the source of confusion in some cases. For purposes of clarity, the phrase includes juveniles 16 and under, but not 17-year-old juveniles.

²⁶⁶ *See supra* note 104 and accompanying text.

²⁶⁷ *See Schleifer v. City of Charlottesville*, 992 F. Supp. 823 (W.D. Va. 1997), *aff'd*, 159 F.3d 843 (4th Cir. 1998), *cert. denied*, 199 S. Ct. 1252 (1999).

²⁶⁸ *See id.* at 829.

context of juvenile rights jurisprudence.²⁶⁹ The court described numerous situations in which juveniles have limited rights, including compulsory school attendance, the driving privilege, and limitations on certain types of employment.²⁷⁰ Recognizing that juveniles' rights are not coextensive with those of adults, the majority concluded that intermediate scrutiny was the appropriate standard.²⁷¹

In support of the first prong of the intermediate scrutiny standard, the important governmental interest, the city called a criminologist expert in juvenile curfews who testified that Charlottesville crime rates paralleled national increases in juvenile crime.²⁷² As is often the case when courts adjudicate curfew challenges, the city easily satisfied the first prong.²⁷³ With regard to the second prong, the substantial relation requirement, the court agreed "that the curfew must be shown to be a meaningful step towards solving a real, not fanciful problem."²⁷⁴ Nevertheless, the standard "has never required scientific or statistical 'proof' of the wisdom of the legislature's chosen course."²⁷⁵ The court rejected the argument that the curfew was impermissibly underinclusive for failing to include seventeen-year-old juveniles within the curfew regulation.²⁷⁶ In response to the plaintiffs' charge that the curfew failed to include a group responsible for one third of all juvenile crimes nationwide, the city proffered local statistics showing that juveniles aged ten to sixteen were responsible for eighty to eighty-five percent of local criminal arrests in 1995 and 1996.²⁷⁷ Thus, the local statistics tended to refute the contention that the curfew was underinclusive. Ultimately, the majority viewed the exclusion of seventeen-year olds as an appropriate exercise of legislative judgment.²⁷⁸

The Fourth Circuit majority ultimately upheld the curfew under intermediate scrutiny, but stated that the curfew would have survived even strict scrutiny.²⁷⁹ The court noted that the curfew ordinance was "the least restrictive means to advance Charlottesville's compelling in-

²⁶⁹ See *id.* at 847 ("Minors enjoy some rights under the First and Fourteenth Amendments before they attain adulthood. At the same time, the Supreme Court has made abundantly clear that children's rights are not coextensive with those of adults." (citations omitted)); see also *supra* notes 125-37 and accompanying text (discussing minors' rights).

²⁷⁰ See *Schleifer*, 992 F. Supp. at 847.

²⁷¹ See *id.*

²⁷² See *id.* at 848.

²⁷³ See *id.* at 848-49.

²⁷⁴ *Id.* at 849.

²⁷⁵ *Id.* (citation omitted).

²⁷⁶ See *id.* at 849-50.

²⁷⁷ See *id.* at 850 ("[T]he City's decision to exclude seventeen-year-olds from coverage under the curfew is a legislative judgment that we are loath to second-guess.").

²⁷⁸ See *id.*

²⁷⁹ See *id.* at 851.

terests.”²⁸⁰ Indeed, the majority credited the district court’s assessment that Charlottesville’s curfew appeared to be “among the most modest and lenient of the myriad curfew laws implemented nationwide.”²⁸¹ While the assessment that the curfew is among the most reasonable nationwide has some support, Part V.B of this Note will challenge the conclusion that it is the least restrictive means to advance the city’s interests.

Judge Michael dissented, arguing that the curfew should have been struck down under strict scrutiny.²⁸² Recognizing that age is not a suspect classification, Judge Michael argued that the age classification affected fundamental constitutional rights and thus triggered strict scrutiny.²⁸³

In applying this standard, Judge Michael conceded that the City has a compelling interest in preventing crime, but argued that the Charlottesville curfew was not narrowly tailored, because it “treat[ed] all minors the same even though an exceedingly small percentage commit crimes.”²⁸⁴ With regard to the city’s second objective of promoting the safety and well-being of juveniles, Judge Michael determined that the curfew did not serve a compelling governmental interest, because it attempts to achieve its purpose by “displacing parental authority over the upbringing of children.”²⁸⁵ Furthermore, he noted that the majority stated only that the city has a “strong” interest in this objective, and that “strong” interests are not “compelling.”²⁸⁶ Judge Michael also found that the ordinance’s third stated purpose, fostering parental responsibility, also did not support a compelling state interest because the curfew displaces parental authority.²⁸⁷ Fi-

²⁸⁰ *Id.* at 852.

²⁸¹ *Id.* at 855 (internal quotation marks omitted). Although not explicitly mentioned in the majority opinion, one could speculate that the existence of a sunset provision contributed to the modest and lenient nature of the curfew. See CHARLOTTESVILLE, VA., CITY CODE § 17-7-2 (1996), which states:

2. Within one year after the effective date of March 1, 1997 of this ordinance, the City Manager shall review this ordinance and report and make recommendations to the City Council concerning the effectiveness of and the continuing need for the ordinance. The City Manager’s report shall specifically include the following information: (a) the practicality of enforcing the ordinance and any problems with enforcement identified by the Police Department; (b) the impact and cost of the ordinance; (c) other data and information which the Police Department believes to be relevant in assessing the effectiveness of the curfew ordinance; and (d) information from citizens regarding whether the ordinance has been administered and enforced fairly, including information regarding the age, gender and race of those charged or detained under the ordinance.

²⁸² See *id.* at 858 (Michael, J., dissenting).

²⁸³ See *id.* at 859-60 (Michael, J., dissenting).

²⁸⁴ *Id.* at 866 (Michael, J., dissenting).

²⁸⁵ *Id.* at 867-68 (Michael, J., dissenting).

²⁸⁶ *Id.* at 867 (Michael, J., dissenting).

²⁸⁷ See *id.* at 868 (Michael, J., dissenting).

nally, Judge Michael argued that even if the curfew passed strict scrutiny, it would nevertheless be unconstitutional because the First Amendment "exception" was impermissibly vague.²⁸⁸ Consequently, Judge Michael concluded that the majority decision "relegates kids to second-class citizenship" by allowing infringement of their fundamental rights.²⁸⁹

IV

RECONCILING CONFLICTING STANDARDS IN ADJUDICATING JUVENILE CURFEW CHALLENGES

Nunez, Hutchins, and Schleifer illustrate the pronounced split in federal authority haunting the adjudication of juvenile curfews. In view of these recent cases, the analysis leads back to square one—determining the appropriate level of constitutional scrutiny. The courts must first articulate the level of scrutiny before it applies the standard. In some circumstances, however, analysis of the courts' application of the standard is a better reflection of the actual scrutiny involved than the one it articulates. This next Part summarizes the standards articulated by judges deciding curfew challenges and then analyzes the application of those standards in an attempt to clarify which standard judges actually implement. Several questions arise in the context of this analysis: Why were the curfews in the examined cases accorded their various treatments? Were the curfews much different in scope or exceptions? What effect do differing circumstances, in terms of crime rates and statistics, have on the vitality of juvenile curfews? This Note endeavors to reconcile the conflicting decisions by addressing these and other questions.

A. Determining the Appropriate Level of Constitutional Scrutiny

1. *Articulating the Standard*

Of the federal cases that have adjudicated juvenile curfews under one of the three standards of scrutiny, ten federal judges have articulated strict scrutiny as the appropriate standard, ten have chosen intermediate scrutiny, and six have chosen rational review.²⁹⁰

²⁸⁸ See *id.* (Michael, J., dissenting).

²⁸⁹ *Id.* at 858 (Michael, J., dissenting).

²⁹⁰ These numbers are gleaned from the federal district court and circuit court opinions that have utilized one of the three standards of review in adjudicating curfew challenges. These numbers do not distinguish between heightened review triggered under due process and heightened review triggered under equal protection. For a discussion of the doctrinal sources of the different standards of review, see *infra* Part V.A. Decisions adjudicated solely on other grounds, such as overbreadth or jurisdictional defects, are excluded. Hence, the district court opinion in *Johnson v. City of Opelousas* is included, whereas the circuit court decision in the same case, which was expressly limited to overbreadth, is not. Similarly, *Naprstek v. City of Norwich* and *McColleston v. Keene* are also excluded. No

Consequently, the cases exhibit a clear judicial preference for some form of heightened review.

The judges who have chosen rational review are the following: (1) Chief Judge Sheridan, district court judge in *Bykofsky v. Borough of Middletown*;²⁹¹ (2) Judge Shaw, district court judge in *Johnson v. City of Opelousas*;²⁹² and (3) Judge Silberman, writing for the plurality in the en banc rehearing of *Hutchins v. District of Columbia*, joined by Judges Williams, Sentelle, and Randolph.²⁹³ One possible explanation for the application of rational review hinges on the impact of *Bellotti*.²⁹⁴ Because *Bykofsky* predated *Bellotti* by three years, the *Bykofsky* court decided its case without the benefit of *Bellotti*. Hence, one could argue that *Bykofsky* would be analyzed differently today.

The argument rejecting rational review based on this chronology of events is at least indirectly supported by the Eastern District of Pennsylvania's recent decision in *Gaffney v. City of Allentown*.²⁹⁵ In *Gaffney*, the court applied the *Bellotti* criteria and found that diminished scrutiny was not justified.²⁹⁶ The *Gaffney* court declined to follow *Bykofsky* and invalidated a juvenile curfew law under strict scrutiny.²⁹⁷ Despite the clear rejection of *Bykofsky*'s import, *Gaffney* is an unreported case, so the extent of its significance is questionable. Arguably, it is the first step in *Bykofsky*'s erosion within the Third Circuit. The other two cases involving rational review ignored the apparent significance of *Bellotti*; neither the majority opinion in *Johnson* nor part II of Judge Silberman's plurality decision in *Hutchins* makes any mention of it.²⁹⁸

A more plausible explanation for the application of rational review stems from the analysis of fundamental rights. Each of the judges choosing rational review has found that the challenged juve-

appeals were taken in *Gaffney v. City of Allentown* or *Waters v. Barry*. See *supra* Part I.B.2. Only two judges from *Qutb* were included, because one judge concurred only in the judgment, without expressing an opinion on the manner in which the decision was made. See *Qutb v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993).

²⁹¹ 401 F. Supp. 1242, 1245 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision).

²⁹² 658 F.2d 1065 (5th Cir. Unit A Oct. 1981).

²⁹³ 188 F.3d 531, 534 (D.C. Cir. 1999) (en banc).

²⁹⁴ See *supra* Part II.A.

²⁹⁵ 1997 WL 597989 (E.D. Pa. Sept. 17, 1997).

²⁹⁶ See *id.* at *4-5.

²⁹⁷ The court stated:

In light of the paucity of support for the City's argument that the curfew protects minors, and the inability of the City to show that the curfew protects the rest of society by significantly reducing crimes committed by minors, this court must hold that the curfew does not meet strict scrutiny.

See *id.* at *8.

²⁹⁸ See *Hutchins*, 188 F.3d at 536-41 (plurality opinion); *Johnson v. City of Opelousas*, 488 F. Supp. 433, 434 (W.D. La. 1980), *rev'd*, 658 F.2d 1065 (5th Cir. Unit A Oct. 1981).

nile curfew does not infringe upon any fundamental rights.²⁹⁹ These findings were based on the fact that curfew exceptions were made for explicitly recognized fundamental rights—interstate travel and First Amendment activity³⁰⁰—and that any other rights allegedly implicated were not “fundamental.”³⁰¹ Most courts have characterized the issue as whether the curfew restricts a juvenile’s right to freedom of movement or intrastate travel,³⁰² though a division of authority exists as to whether this right is fundamental.³⁰³ Conversely, a minority of judges have characterized the issue as whether “juveniles have a fundamental right to be on the streets at night without adult supervision.”³⁰⁴ Predictably, the judges adopting this characterization have concluded that no such fundamental right exists.³⁰⁵ This Note agrees with the former approach, noting that the latter characterization “needlessly entangles equal protection and due process analysis by defining a fundamental right with reference to the class of people asserting it.”³⁰⁶ Putting aside for the moment the issue of proper characterization, Part V.A of this Note challenges the conclusion that heightened review is not warranted simply because the alleged right restricted by a juvenile curfew is not deemed fundamental.³⁰⁷

The decisions that articulated strict scrutiny as the appropriate standard contain several textual references indicating some decrease in the standard of review. In *Nunez*, for example, the Ninth Circuit

299 See *Hutchins*, 188 F.3d at 538 (Silberman, J.) (plurality opinion); *Johnson*, 488 F. Supp. at 440; *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975).

300 For a discussion of the fundamental rights exceptions, see *infra* Part IV.B.

301 *Hutchins*, 188 F.3d at 538 (Silberman, J.) (plurality opinion); *Johnson*, 488 F. Supp. at 440; *Bykofsky*, 401 F. Supp. at 1265.

302 See, e.g., *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (characterizing the right as one of “free movement”); *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (framing the issue as whether the curfew restricts the “right to move about freely”); *Bykofsky*, 401 F. Supp. at 1254, 1262 (characterizing the right as one of “freedom of movement” and “intrastate travel”). Interestingly, the Fourth Circuit in *Schleifer v. City of Charlottesville* framed the issue more generally, finding that the curfew infringes upon minors’ “constitutional liberties.” 159 F.3d 843, 847 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1252 (1999).

303 See, e.g., *Nunez*, 114 F.3d at 944 (“Citizens have a fundamental right of free movement . . .”); cf. *Qutb*, 11 F.3d at 492 (“[W]e assume without deciding that the right to move about freely is a fundamental right.”). But see *Bykofsky*, 401 F. Supp. at 1265 (“[T]he curfew ordinance does not impinge upon the exercise of ‘fundamental’ rights.”). For noncurfew cases deciding whether the right to intrastate travel is a fundamental right, see *infra* notes 378-80.

304 *Hutchins*, 188 F.3d at 538 (Silberman, J.) (plurality opinion). Four of the 11 sitting judges on the D.C. Circuit’s en banc panel adopted this characterization; Judges Williams, Sentelle, and Randolph joined in Part II of Judge Silberman’s plurality opinion. See *id.* at 534.

305 See *id.* at 538.

306 *Id.* at 556 (Rogers, J., concurring in part, dissenting in part). For a thorough objection to the narrow characterization of the allegedly infringed right, see Part I of Judge Rogers’ opinion, *id.* at 552-60.

307 See *infra* Part V.A.

explicitly rejected intermediate scrutiny and chose to apply strict scrutiny.³⁰⁸ Nevertheless, the Ninth Circuit also conceded "that strict scrutiny in the context of minors may allow greater burdens on minors than would be permissible on adults as a result of the unique interests implicated in regulating minors."³⁰⁹ Similarly, in *Qutb*, the Fifth Circuit noted that "under certain circumstances, minors may be treated differently from adults."³¹⁰ These textual references indicate judicial cognizance of heightened scrutiny, yet subtly acknowledge differential treatment on account of minority. The next section of this Note argues that even the courts that articulate strict scrutiny as the appropriate standard actually utilize an approach more properly characterized as intermediate scrutiny.

2. *Examining the Applied Standard*

a. *Extent of the State Interest*

Courts are in general agreement that states have a compelling interest in reducing juvenile crime and victimization.³¹¹ As the Supreme Court recognized in *Schall v. Martin*, "[t]he 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."³¹² This interest loses no validity simply from the involvement of minors.³¹³ Since the state interest involved is sufficient to satisfy the strict scrutiny standard, then, a fortiori, it is sufficient for intermediate scrutiny and rational review. Even courts adopting the intermediate scrutiny standard concede that a state's interest in reducing juvenile crime and victimization is compelling.³¹⁴

³⁰⁸ In *Nunez*, the Ninth Circuit held that strict scrutiny applied:

Although the state may have a compelling interest in regulating minors differently than adults, we do not believe that this lesser degree of scrutiny is appropriate to review burdens on minors' fundamental rights. Thus, the district court erred in stating that minors' "circumscribed" liberty interest was not fundamental and could be subjected to intermediate scrutiny. The district court nevertheless correctly decided to apply strict scrutiny, despite its conclusion that a lower level of scrutiny was permissible.

Nunez, 114 F.3d at 946.

³⁰⁹ *Id.*

³¹⁰ *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993).

³¹¹ See, e.g., *Hutchins*, 188 F.3d 531 (D.C. Cir. 1999) (en banc); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 849 (4th Cir. 1998), cert. denied, 119 S. Ct. 1252 (1999); *Nunez*, 114 F.3d at 946-47; *Qutb*, 11 F.3d at 492; *Waters v. Barry*, 711 F. Supp. 1125, 1139 (D.D.C. 1989); see also *Craig v. Boren*, 429 U.S. 190, 199-200 (1976) ("Clearly, the protection of public health and safety represents an important function of state and local governments.").

³¹² 467 U.S. 253, 264 (1984) (upholding the constitutionality of a state statute that authorized the pretrial detention of juveniles).

³¹³ See *id.* at 264-65.

³¹⁴ See *Schleifer*, 159 F.3d at 849 (conceding, for the sake of argument, that the state interest is compelling).

b. *The Means-Ends Fit*

In contrast to the general consensus concerning the first prong of constitutional scrutiny, the second prong is more problematic. The operative question of the second prong is the degree of correlation between the means and ends. Recall that under strict scrutiny, a law will pass constitutional muster only if it is narrowly tailored to serve a compelling state interest.³¹⁵ The Supreme Court has interpreted the narrow-tailoring requirement to require that the regulation be necessary and the least restrictive means of achieving the proffered ends.³¹⁶ Under the intermediate scrutiny standard, a very close relationship between means and ends is required to ensure that legislatures act "on the basis of reasoned analysis rather than assumptions."³¹⁷

In examining juvenile curfews under both the intermediate and strict scrutiny standards, the courts have identified several means-ends defects caused by statistical gaps in proffered data.³¹⁸ The following subsections discuss alleged defects in time dimension and age classifications and argue that the actual degree of scrutiny applied in the "strict scrutiny" cases is more consistent with intermediate scrutiny.

i. *Defects in Means-Ends Fit: The Time Dimension*

The time-dimension issue involves the relationship between the time of day during which juvenile crime and victimization occur and the operative hours of juvenile curfews. The problems implicated by the time-dimension issue are best illustrated with an example. In one

³¹⁵ See *supra* notes 129-30 and accompanying text.

³¹⁶ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237-38 (1995) (holding that all racial classifications are subject to strict constitutional scrutiny, thereby overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which had held that so called "benign" racial classifications were subject only to intermediate scrutiny).

³¹⁷ *Hutchins v. District of Columbia*, 144 F.3d 798, 811 (D.C. Cir. 1998) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999)). Writing for a 5-4 majority in *Hogan*, Justice O'Connor explicated on the contours of the "substantial relation" requirement:

If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.

Hogan, 458 U.S. at 725-26 (footnote omitted).

³¹⁸ Other alleged statistical defects have been identified in addition to the time dimension and age classification. For example, in *Hutchins*, the plaintiffs alleged that the district failed to provide data to show where juvenile crimes and victimizations occurred (i.e., at home or in public). See *Hutchins*, 188 F.3d at 542. Arguably, if most juvenile victimizations occur inside the home, then a curfew may be ineffectual in meeting the city's objective of reducing juvenile victimizations. In response, however, a plurality of the D.C. Circuit found that the fact "[t]hat a substantial percentage of violent juvenile victimizations (approximately 33%) occurred on the streets adequately supports the relationship between the government's interest and the imposition of the curfew." *Id.* at 544.

commentary supporting charitable judicial treatment of juvenile curfews, the author tells a tragic story of a fourteen-year-old straight-A student who, as an innocent bystander, was gunned down by youth gang violence in Chicago.³¹⁹ The author concedes, however, that the incident actually occurred at 8:39 P.M., clearly outside the scope of any curfew statute.³²⁰ Consequently, statistics illustrating hourly breakdowns for juvenile crime serve important informational needs to assess the efficacy of curfew regulations.³²¹

Judicial response to the time-dimension gap has varied. In *Qutb v. Strauss*,³²² for example, the Fifth Circuit purported to apply strict scrutiny. However, in response to arguments about the statistical defects, the Fifth Circuit tersely noted:

Although the city was unable to provide precise data concerning the number of juveniles who commit crimes during the curfew hours, or the number of juvenile victims of crimes committed during the curfew, the city nonetheless provided sufficient data to demonstrate that the classification created by the ordinance "fits" the state's compelling interest.³²³

Indeed, as one commentator who applauded the *Qutb* decision conceded, the actual scrutiny applied by the court was somewhat

³¹⁹ See Siebert, *supra* note 29, at 1711.

³²⁰ See *id.* at 1711 n.1.

³²¹ Even jurisdictions that have enacted juvenile curfews recognize the importance of time-specific and age-related statistics. For example, the curfew ordinance invalidated in *Waters v. Barry*, 711 F. Supp. 1125 (D.D.C. 1989), contained a review process provision, which mandated the use of specific statistics to gauge the efficacy of the curfew. The provision read in pertinent part:

§ 5. Review Process.

(a) Five days, excluding Saturdays, Sundays, holidays and days of Council recess, prior to the expiration of this act, the Mayor shall report to the Council on the curfew's effectiveness and shall recommend that the curfew for minors either be continued or discontinued.

(b) Criteria by which effectiveness shall be measured include monthly statistics, by ward and police precinct, on:

- (1) The number of minors detained and the number of persons fined as a result of a violation of this act;
- (2) The number of criminal homicides and other narcotic trafficking related crimes of violence committed *during the time that this act is in effect, by age and time of day*; and
- (3) The number of *minors injured during the curfew hours* as a result of crime and the cause of each injury.

Id. at 1142 app. A (quoting District of Columbia, Temporary Curfew Emergency Act of 1989, No. 8-325 (Apr. 14, 1989)) (internal quotation marks omitted) (emphasis added).

The court held the ordinance unconstitutional, noting that, "[i]n 1988, of the 26 juveniles killed . . . not one was clearly killed at a time or place that he or she would not have been had the curfew been in effect" and that "[p]recisely half of these killings occurred in the juvenile's home." *Id.* at 1139.

³²² 11 F.3d 488 (5th Cir. 1993).

³²³ *Id.* at 493 (footnote omitted).

"charitable and cursory."³²⁴ Although the *Qutb* court clearly exhibited a preference for heightened review, the court's willingness to overlook the state's inability to substantiate the efficacy of the curfew undermines the usual rigor of strict scrutiny. Furthermore, the court's outright dismissal of statistics, which tended to cut against the constitutionality of juvenile curfews, also undermined the court's purported application of strict scrutiny.

The court in *Nunez v. City of San Diego* similarly overlooked imperfect statistical information in purportedly applying strict scrutiny.³²⁵ In *Nunez*, the City of San Diego offered a Justice Department report showing that nationwide, juvenile crime peaks at around 3:00 P.M. and again around 6:00 P.M.³²⁶ The court noted the general relevance of such statistics, but held that national statistics are not sufficiently probative of the local situation.³²⁷ However, San Diego also offered local statistics detailing juvenile crime and victimization rates.³²⁸ The city's 1995 report showed that juvenile victimization actually increased during curfew hours in the year after curfew enforcement began and that "only 15% of arrests for violent juvenile crimes occurred during curfew hours."³²⁹ The city's 1996 report was somewhat more supportive of its case, showing a slight drop-off in juvenile victimization, coupled with increased juvenile violent crime arrests during curfew hours.³³⁰ Despite these defects, the Ninth Circuit refused to invalidate the curfew "based on the argument that a curfew is not particularly effective at meeting the City's interest."³³¹ While rejecting the city's justification that the curfew had a beneficial "deterrent effect," the court nevertheless concluded that the city established "some nexus" between means and ends.³³² As the "some nexus" language itself suggests, the standard the court applied was indeed a heightened one, though it seemingly falls short of a true strict-scrutiny standard. Hence, the analyses in *Qutb* and *Nunez* support the view that the level of scrutiny applied by the courts was somewhat less than "strict."

³²⁴ *Siebert*, *supra* note 29, at 1734-35. The author also argues that juvenile curfew laws, such as those upheld in *Qutb*, will help fight juvenile crime. He proposes a few changes that he thinks would help insulate a *Qutb*-type curfew from constitutional infirmity.

³²⁵ See *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997).

³²⁶ See *id.* at 947 (referring to national statistics gathered by the Justice Department).

³²⁷ See *id.* ("We accept the relevancy of the national crime statistics regarding the general increase of dangers to minors and others, but the national statistics do not conclusively show that the nocturnal juvenile curfew is a narrowly tailored solution.").

³²⁸ See *id.*

³²⁹ *Id.*

³³⁰ The statistical information cited in the case refers to the first quarter of 1995 to 1996, rather than the year end results. See *id.*

³³¹ *Id.* at 948 ("We will not dismiss the City's legislative conclusion that the curfew will have a salutary effect on juvenile crime and victimization.").

³³² *Id.*

The circuit judges applying intermediate scrutiny have been equally rigorous, if not more, than those judges purporting to apply strict scrutiny. Take for example *Hutchins v. District of Columbia*. Initially, Judge Rogers's opinion found that the District of Columbia's proffered statistics were insufficient to sustain the intermediate scrutiny standard.³³³ There, the evidence establishing the time of day of juvenile offenses was contradicted by other evidence and was flawed because it included statistics on seventeen-year olds, who were outside the scope of D.C.'s curfew.³³⁴ Because the evidentiary defects went to the very "fundamental features of the curfew—the age of those covered and the hours of coverage"—the curfew could not pass intermediate scrutiny.³³⁵

Upon the rehearing en banc, however, a plurality of the D.C. Circuit held that the District had in fact established that it had met the intermediate scrutiny standard by demonstrating its problem with juvenile crime and victimization during curfew hours.³³⁶ The court pointed to evidence indicating that over fifty percent of juvenile arrests took place during curfew hours.³³⁷ There was some debate as to the accuracy of the data that the D.C. Council presented on this point, but the court dismissed any discrepancies as "minor."³³⁸ Furthermore, the court held that because serious crimes among all age groups were more likely to occur during curfew hours, this evidence substantiated the fit between the curfew and the city's objectives.³³⁹

In *Schleifer v. City of Charlottesville*, in which intermediate scrutiny was applied, the plaintiffs relied on a Justice Department report which asserted that seventeen percent of juvenile crime occurs during curfew hours, while the peak of twenty-two percent occurs between 2:00 P.M. and 6:00 P.M. on school days.³⁴⁰ The City of Charlottesville responded by questioning the underlying assumptions of the study, arguing that the statistics in that study were probably skewed because several of the cities in the control group already had curfews in effect;³⁴¹ in other words, Charlottesville argued that curfews were responsible for the lower nighttime rates in the other cities. Charlottesville rebutted this study by submitting the testimony of city police officers confirming that most serious juvenile crimes occur dur-

³³³ See *Hutchins v. District of Columbia*, 144 F.3d 798, 815 (D.C. Cir. 1998), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999).

³³⁴ See *id.* at 814.

³³⁵ *Id.* at 815.

³³⁶ See *Hutchins*, 188 F.3d at 543-44 (en banc) (plurality opinion).

³³⁷ See *id.*

³³⁸ *Id.* at 543.

³³⁹ See *id.* at 544.

³⁴⁰ See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 850 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999).

³⁴¹ See *id.*

ing curfew hours.³⁴² Further, Charlottesville showed a thirty-eight percent increase in juvenile offenses between 11:00 P.M. and 6:00 A.M.³⁴³ Even though the city's curfew commences at 12:01 A.M. on weekdays and 1:00 A.M. on weekends, the Fourth Circuit did not find the arguments regarding the time-dimension defects persuasive.³⁴⁴ Instead, the court held that "[t]he Constitution certainly does not put legislatures to the choice of solving the entirety of a social problem or no part of it at all."³⁴⁵ The curfew passed constitutional muster because the court found it was a "meaningful step towards solving a real, not fanciful problem."³⁴⁶

ii. *Defects in Means-Ends Fit: The Age Correlation*

Statistical problems related to age classifications bear on the efficacy of juvenile curfews. Arguably, if seventeen-year-old minors unaffected by the curfew commit most juvenile crimes, then this would undermine the underlying rationale for juvenile curfew statutes. National statistics reveal that seventeen-year olds are responsible for more juvenile crime than their younger counterparts.³⁴⁷ Nevertheless, the judicial responses to this defect have been as varied as the responses to defects in the time dimension. For example, the statistics proffered by the District of Columbia in *Hutchins* failed to distinguish between seventeen-year-old minors, who are not subject to the curfew, and those under seventeen who are subject to the curfew.³⁴⁸ Similarly, the District's evidence supporting the curfew's effectiveness in reducing juvenile victimization included youths aged fifteen through nineteen.³⁴⁹ Initially, the court found these defective statistics to be insufficient to withstand intermediate scrutiny: "As the annual reports of the D.C. courts show, youths aged seventeen and older were responsible for 42% of juvenile referrals for the years 1990 through 1994; a curfew excluding this group lacks a close fit to the goal of reducing juvenile crime."³⁵⁰ Furthermore, since the statistics failed to point out what percentage of youths the curfew does not affect (those between seventeen and nineteen), they offered "only weak evidence that the curfew will much reduce the teen violent death rate."³⁵¹

³⁴² See *id.*

³⁴³ See *id.*

³⁴⁴ See *id.*

³⁴⁵ *Id.* at 851 (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

³⁴⁶ *Id.* at 849.

³⁴⁷ See 1997 UPDATE ON VIOLENCE, *supra* note 44, at 12.

³⁴⁸ See *Hutchins v. District of Columbia*, 144 F.3d 798, 814 (D.C. Cir. 1998), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999).

³⁴⁹ See *id.*

³⁵⁰ *Id.* (footnotes omitted).

³⁵¹ *Id.*

Upon rehearing en banc, a plurality of the D.C. Circuit held that these alleged defects did not render the fit between the curfew and the goal unconstitutional.³⁵² The court noted that the District presented "more data showing that arrests for youths under [seventeen] have been increasing steadily."³⁵³ Furthermore, even if seventeen-year olds were more likely to commit crimes than their younger counterparts, the court noted that the "District can hardly be faulted for determining not to include [seventeen-year] olds in the curfew."³⁵⁴ In other words, the court would not blame the city for being less intrusive than it could have been.³⁵⁵ In *Qutb*, by comparison, the Fifth Circuit did not address the statistical defects explicitly, but instead found that precise data was not necessary to withstand strict scrutiny.³⁵⁶

The plaintiffs in *Schleifer* advanced a similar age-correlation argument.³⁵⁷ The plaintiffs argued that the ordinance was not substantially related to its objective because it excluded seventeen-year olds from curfew regulation, even though seventeen-year olds committed one third of all juvenile crimes nationwide.³⁵⁸ In response, Charlottesville advanced specific evidence showing that eighty to eighty-five percent of local juvenile arrests for serious crimes were within the ten- to sixteen-year-old age group.³⁵⁹ The court therefore declined to invalidate the curfew based on the argument that it was impermissibly underinclusive.³⁶⁰ This information was apparently sufficient to rebut the inference that the curfew was ineffective.³⁶¹

The *Nunez* case did not address this statistical gap because San Diego's curfew applied to everyone under the age of eighteen.³⁶² As

³⁵² See *Hutchins*, 188 F.3d at 542-45.

³⁵³ *Id.* at 543.

³⁵⁴ *Id.*

³⁵⁵ See *id.*

³⁵⁶ See *Qutb v. Strauss*, 11 F.3d 488, 493 (5th Cir. 1993); *supra* notes 115-17 and accompanying text.

³⁵⁷ See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 849-50 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999).

³⁵⁸ See *id.*

³⁵⁹ See *id.* at 850-51. Charlottesville also presented evidence that certain crimes were more likely to occur during curfew hours:

The record documents that in Charlottesville in 1996 aggravated assaults were almost one and one-half times as likely to occur during curfew hours as non-curfew hours, robberies more than twice as likely to occur at these times, forcible rapes more than three times as likely during curfew hours, and incidents of drunk driving more than five times more likely to occur during curfew hours, trends that continued into the first months of 1997.

Id. at 351.

³⁶⁰ See *id.* at 850 ("[T]he City's decision to exclude seventeen-year-olds from coverage under the curfew is a legislative judgment that we are loath to second-guess.").

³⁶¹ See *id.*

³⁶² See *Nunez v. City of San Diego*, 114 F.3d 935, 938 (9th Cir. 1997).

noted earlier, however, the court found "some nexus" existed between the curfew and its stated objective despite statistical gaps relating to the time dimension.³⁶³ This language suggests that the Ninth Circuit would probably have overlooked similar age correlation defects in the proffered statistics.

Analysis of the applied standards in these cases reveals an interesting fact: The curfew justifications presented in *Schleifer* and *Hutchins* appear to be as strong, if not stronger, than those in the *Quib* and *Nunez* cases. However, the *Schleifer* and *Hutchins* courts accorded more stringent treatment after elucidating a less stringent standard. In other words, the strict scrutiny standard in *Quib* and *Nunez* apparently was somewhat diminished. More specifically, the applied standard in *Quib* and *Nunez* comports with the contours of intermediate scrutiny as applied in *Schleifer* and *Hutchins*.³⁶⁴

In addition to questions of application, other issues are relevant in determining the judicial treatment juvenile curfew challenges will receive. The next section discusses curfew exceptions, or lack thereof, and their bearing on the validity of juvenile curfews.

B. Curfew Drafting: Ensuring Sufficient Exceptions Without "Swallowing the Rule"

Curfew drafters are faced with a dilemma: Insufficient exceptions render an ordinance susceptible to constitutional attack, whereas too many exceptions create the danger that the exceptions will swallow the rule.³⁶⁵ The first type of danger is manifest in *Nunez*.³⁶⁶ The Ninth Circuit explicitly stated that San Diego's "failure to provide adequate exceptions not only excessively burdens minors' right to free movement, but it also excessively burdens their right to free speech."³⁶⁷ Case law has sufficiently addressed the issue of too few exceptions by virtue of the overbreadth doctrine.³⁶⁸ This section focuses on the latter half of the dilemma.³⁶⁹

³⁶³ See *id.* at 948.

³⁶⁴ For a discussion on the application of intermediate scrutiny, see *infra* Part V.C.

³⁶⁵ Cf. *Schleifer*, 159 F.3d at 853 ("If [city] councils draft an ordinance with exceptions, those exceptions are subject to a vagueness challenge. If they neglect to provide exceptions, then the ordinance is attacked for not adequately protecting First Amendment freedoms.").

³⁶⁶ See *Nunez*, 114 F.3d at 948.

³⁶⁷ *Id.* at 949.

³⁶⁸ For a discussion of earlier cases defining the parameters of overbreadth challenges, see *supra* Part I.B.2.

³⁶⁹ This Part intends to survey the varied exceptions to juvenile curfews, rather than to fully analyze their implications. To reach the merits of a given case under the Equal Protection Clause, this Note assumes that a challenged curfew provides adequate and clear exceptions, particularly for fundamental rights, to withstand vagueness and overbreadth challenges. See *supra* Part I.B.2.

The ordinance at issue in *Qutb*, with its numerous exceptions, is theoretically susceptible to the second type of danger.³⁷⁰ An analysis of the different types of exceptions typically drafted into to curfew regulations is a helpful analytical tool. The *Qutb* curfew is particularly instructive in this regard.³⁷¹ The exceptions in *Qutb* can be divided into three categories: (1) legal guardianship/supervision; (2) prudential/practical exceptions; and (3) fundamental rights:

Legal Guardianship/ Supervision	Prudential/Practical Exceptions	Fundamental Rights
- accompanied by guardian	- employment activity	- First Amendment rights
- errand directed by guardian	- school/civic function	- Interstate travel
- sidewalk of minor's residence	- emergency situation	
- emancipated minor		

As noted earlier, legislators enact juvenile curfews for three reasons: (1) to reduce juvenile crime, (2) to reduce juvenile victimization, and (3) to increase parental responsibility.³⁷² Legal guardianship exceptions to the curfew are justified because the three legislative policy rationales underlying the curfew are adequately addressed under these exceptions. For example, a child accompanied by a guardian is presumably less likely to commit a crime or fall victim to one. Further, such exceptions accommodate the rights of parents to rear their children.³⁷³ Nevertheless, some enforcement problems still surface, as illustrated by the guardian-directed-errand exception.³⁷⁴ In consideration of this exception, some municipalities have adopted interesting approaches for enforcement, such as requiring the minor to possess a note from the guardian describing the errand.³⁷⁵

As the name suggests, practical considerations give rise to the exceptions in the prudential/practical category.³⁷⁶ Surely a genuine emergency justifies an exception to curfew regulation. Similarly, in the case of a municipally sponsored event, the city should not en-

³⁷⁰ See *supra* notes 103-20 and accompanying text.

³⁷¹ See *supra* note 104 and accompanying text.

³⁷² See *supra* notes 39-41 and accompanying text.

³⁷³ See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999) ("The limited curtailment of juvenile liberty in the ordinance violates neither a minor's nor a parent's rights.").

³⁷⁴ See *Juvenile Curfew Ordinances*, *supra* note 22, at 145 ("[A] broad exception for parental errands might open an excessively large loophole.").

³⁷⁵ See *Schleifer*, 159 F.3d at 857.

³⁷⁶ See *Juvenile Curfew Ordinances*, *supra* note 22, at 144 ("Other exceptions are generally made for children involved in what the legislature determines to be legitimate, innocent activities.").

courage attendance and then punish juveniles for violating the curfew. In addition, exceptions for certain legitimate activities, such as travel to and from employment, help to ensure a curfew's political viability.

Exceptions for fundamental rights would appear to settle any questions regarding the curfew's constitutional infirmity. If activities protected by fundamental rights lie outside of curfew enforcement, the regulation cannot infringe on such rights.³⁷⁷ Nevertheless, simply drafting a defense into the curfew is not a wholly satisfactory response. Creating an exception for certain fundamental rights raises several questions regarding the parameters of those rights and whether there should be exceptions for other rights. For example, creating an exception for interstate travel raises the issue of whether to create a similar exception for intrastate travel. Further, an exception for First Amendment activity simply begs the question of exactly what type of activity the First Amendment protects. Drafting an exception for First Amendment activity and interstate travel supports the inference that these rights are sufficiently important to warrant protection, even for minors. The following sections discuss the implications for drafting exceptions for First Amendment rights and interstate travel.

1. *Fundamental Rights: Interstate v. Intrastate Right to Travel*

The U.S. Supreme Court has determined that the Constitution guarantees the fundamental right to interstate travel.³⁷⁸ The Court, however, has never explicitly recognized the right to intrastate travel as a fundamental right.³⁷⁹ The circuit courts are split with regard to whether a fundamental right to intrastate travel exists.³⁸⁰ Serious

³⁷⁷ See *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1261 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision) (noting that the presence of a properly structured exception makes it "apparent that the ordinance in no way infringes on the right to interstate travel").

³⁷⁸ See *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (invalidating state residency requirement that restricted the receipt of welfare assistance to those who had resided in the jurisdiction for at least one year), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

³⁷⁹ See *Townes v. City of St. Louis*, 949 F. Supp. 731, 734-35 (E.D. Mo. 1996) (discussing circuit split as to judicial recognition of a fundamental right to *intrastate* travel), *aff'd*, 112 F.3d 514 (8th Cir. 1997); see also *Bykofsky*, 401 F. Supp. at 1255 (recognizing the importance of the freedom of movement, but noting that "the liberty guaranteed by the due process clause implies absence of arbitrary interferences but not immunity from reasonable regulations" (citing *Gere v. Stanley*, 453 F.2d 205 (3d Cir. 1971), *aff'd* 320 F. Supp. 852 (M.D. Pa. 1970))).

³⁸⁰ Compare *Lutz v. City of York*, 899 F.2d 255, 258-62 (3d Cir. 1990) (same); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) (same), and *Cole v. Housing Auth.*, 435 F.2d 807 (1st Cir. 1970) (recognizing fundamental right to intrastate travel), with *Andre v. Board of Trustees of Village of Millwood*, 561 F.2d 48 (7th Cir. 1977) (same), *Wardwell v. Board of Ed. of City Sch. Dist.*, 529 F.2d 625 (6th Cir. 1976) (same),

flaws, however, underlie any rationale that supports the distinction between interstate and intrastate travel.³⁸¹

As a practical matter, distinguishing the right to movement on the basis of intrastate versus interstate is unworkable; the right to intrastate travel is necessarily implicit in the right to interstate travel.³⁸² Otherwise, one would have a fundamental right to travel across the state border, but no fundamental right to travel to the state border. Such reasoning poses the following syllogism: If intrastate travel deserves as much protection as interstate travel, and interstate travel is exempted from the purview of the curfew, then intrastate travel must be exempted as well.³⁸³ Consequently, exceptions for both interstate and intrastate travel would swallow the proverbial rule.

Circuit courts that hold that the right to intrastate travel is a fundamental right should arguably be more hostile to juvenile curfews than those courts which do not. Experience, however, has not proven this assumption. For example, in *Wright v. City of Jackson*, the Fifth Circuit declined to recognize intrastate travel as a fundamental right.³⁸⁴ In *Qutb*, however, the same court analyzed a curfew under strict scrutiny, operating on the assumption that the right to move about freely was a fundamental right.³⁸⁵ Conversely, in *Lutz v. City of York*, the Third Circuit explicitly recognized the fundamental right to intrastate travel, including the right to localized movement.³⁸⁶ Yet the circuit has not overruled *Bykofsky*, which exempts only interstate travel and upheld the curfew under rational review. Interestingly, the Third Circuit in *Lutz* held that restrictions on the fundamental right of intrastate travel trigger intermediate scrutiny,³⁸⁷ thus indirectly supporting the view that intermediate scrutiny is appropriate in examining juvenile curfews.³⁸⁸

and *Wright v. City of Jackson*, 506 F.2d 900, 902-03 (5th Cir. 1975) (declining to recognize fundamental right to intrastate travel).

³⁸¹ See generally Andrew C. Porter, Comment, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 Nw. U. L. REV. 820 (1992) (detailing right-to-travel jurisprudence and concluding that courts should recognize a fundamental right to intrastate travel).

³⁸² See *King*, 442 F.2d at 648 ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.").

³⁸³ But see Duane W. Schroeder, Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117, 128-29 (1975) (arguing that the right to intrastate travel is not fundamental and that restrictions should be adjudicated under rational review).

³⁸⁴ See 506 F.2d 900, 901-02 (5th Cir. 1975) (rejecting fireman's challenge to city's residency requirement for municipal employees).

³⁸⁵ See *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993).

³⁸⁶ See 899 F.2d 255, 268 (3d Cir. 1990).

³⁸⁷ See *Townes v. City of St. Louis*, 949 F. Supp. 731, 735 (E.D. Mo. 1996) ("[T]he intermediate scrutiny test espoused in *Lutz* is the proper standard for determining the constitutionality of Ordinance 63038." (citation omitted)).

³⁸⁸ See *infra* Part V.

2. *Fundamental Rights: The First Amendment Exception*

The lack of an exception for First Amendment activity will ordinarily invalidate a juvenile curfew.³⁸⁹ Curfew defects of this sort have been traditionally dealt with under the overbreadth doctrine, as illustrated in *Johnson v. City of Opelousas*.³⁹⁰ Conversely, the inclusion of an exception has often given rise to the claim that it makes the curfew unconstitutionally vague.³⁹¹ The argument has been made that the First Amendment defense would require juveniles to be "'constitutional scholars' to know what activities were forbidden."³⁹² Furthermore, police officers untrained in the intricacies of the First Amendment, in their unguided discretion, [would] enforce the curfew unconstitutionally."³⁹³ A strong counter-argument, however, maintains that the exception "is no more vague than the First Amendment itself."³⁹⁴ In other words, any difficulties in understanding the exception are caused by the contours of First Amendment jurisprudence; the exception ensures that protected activities remain protected.

Another analytical possibility exists, though it has been for the most part unsuccessful. When the curfew lacks an exception for First Amendment activity, the court may try to couch the curfew in terms of a valid time, place, and manner restriction.³⁹⁵ The district court proceedings in *Nunez* illustrate this argument.³⁹⁶ The three requirements for a valid time, place, and manner restriction are: (1) content neutrality; (2) narrow tailoring that serves a significant governmental interest; and (3) sufficient alternative channels for communication.³⁹⁷ Juvenile curfews satisfy the first prong, because they do not distinguish on the basis of content; rather, they restrict across the board.³⁹⁸ Curfews arguably satisfy the third prong as well because sufficient opportunity for movement is available during noncurfew hours.³⁹⁹ The narrow-tailoring requirement will generally invalidate a curfew that

³⁸⁹ See *supra* notes 80-85 and accompanying text and Part III.B.

³⁹⁰ 658 F.2d 1065, 1072 (5th Cir. Unit A Oct. 1981) (striking down curfew on overbreadth grounds).

³⁹¹ See *Hutchins v. District of Columbia*, 188 F.3d 531, 546 (D.C. Cir. 1999).

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

³⁹⁶ See *Nunez v. City of San Diego*, 963 F. Supp. 913, 920 (S.D. Cal. 1995).

³⁹⁷ See *Clark*, 468 U.S. at 293.

³⁹⁸ See *Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997) ("It is undisputed that the regulation is content neutral.").

³⁹⁹ In *Nunez*, the Ninth Circuit found that the curfew was not a valid time, place, and manner restriction because it failed the narrow-tailoring requirement. Thus, the court did "not reach the question of whether the ordinance leaves open adequate alternative channels of expression." *Id.* at 951.

makes no exception for First Amendment activity.⁴⁰⁰ Because curfews face a similar analysis under this doctrine as they do under other constitutional doctrines, such as equal protection, drafters should include a First Amendment exception to protect against constitutional attacks.⁴⁰¹

Simply incorporating a First Amendment exception into a curfew, however, does not necessarily foreclose all First Amendment issues. On the one hand, the Supreme Court has recognized the right to expressive association, which includes assembly for nonpolitical purposes, including social, legal, and economic reasons.⁴⁰² On the other hand, the Court has declined to recognize a "generalized right of 'social association.'"⁴⁰³ Determining whether associational rights protect certain prohibited activities involves an extended inquiry into First Amendment doctrine,⁴⁰⁴ which is beyond the scope of this Note.

V

PROPOSED SOLUTION: APPLICATION OF INTERMEDIATE SCRUTINY

The preceding Parts have described the historical development of juvenile curfews, discussed the current split in federal authority, and sought to reconcile the conflicting decisions. After advocating intermediate scrutiny as the appropriate standard, this Note returns to the question of its application. As illustrated in *Qutb*, however, mere articulation of a standard of review does not always accurately reflect the level of scrutiny actually applied.⁴⁰⁵ Hence, the practical application must also be examined. First, this Part discusses several objections to the application of the intermediate scrutiny standard, as well as the doctrinal sources for the standard. Second, this Part identifies

⁴⁰⁰ See *id.*

⁴⁰¹ The Supreme Court has held that the narrow-tailoring requirement of time, place, and manner restrictions need not be the least restrictive means of achieving its goal. See *Ward v. Rock Against Racism*, 491 U.S. 781, 797-98 (1989). Rather, the Court has required that the means were not "substantially broader than necessary" to achieve its interest. *Id.* at 801 (citation omitted).

⁴⁰² See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (striking down state law that prohibited the use of contraception by married couples as a violation of the constitutional right to privacy).

⁴⁰³ *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (upholding, under rational review, the constitutionality of a city ordinance that limited the use of certain dance halls to persons between the ages of 14 and 18). But see Reena Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1, 11-14 (1977) (arguing for the recognition of an independent right to freedom of association).

⁴⁰⁴ For a discussion of this issue, see Jonathan D. Varat, *When May Government Prefer One Source of Private Expression over Another?*, 45 UCLA L. REV. 1645 (1998). See also Hananel, *supra* note 22, at 317-18 ("It remains to be seen whether the exception for all minors exercising First Amendment rights creates a gaping hole in the ordinance that actually encompasses all the activity the ordinance is designed to prohibit").

⁴⁰⁵ See *supra* Part IV.

sources of juvenile crime and discusses alternative measures that cities can use which may be more effective and efficient than generalized juvenile curfews. Finally, this Part argues that application of the intermediate scrutiny standard is fair, workable, and consistent with the Supreme Court's jurisprudence on juvenile rights. It also discusses the baseline offers of proof necessary to satisfy the intermediate scrutiny standard. Rather than establishing a bright-line rule for how well curfews must work in order to pass constitutional scrutiny, the purpose here is to ensure that curfews have some measure of efficacy in reducing juvenile crime and victimization before they are upheld.

A. Countering Objections to the Application of Intermediate Scrutiny

In contrast to strict scrutiny or rational review, "intermediate scrutiny requires the Court to weigh conflicting rights and interests and does not predetermine the outcome of the case."⁴⁰⁶ In response, critics of the intermediate scrutiny standard claim it is too indeterminate, giving too much "legislative" power to the courts.⁴⁰⁷ Indeed, one Supreme Court Justice characterized the standard as "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation."⁴⁰⁸ Nevertheless, the intermediate scrutiny standard offers courts the ability to examine juvenile curfews by carefully weighing the rights of juveniles against the interests of the state.⁴⁰⁹ Intermediate scrutiny ensures a good means-ends fit sought by legislatures without unduly inhibiting their efforts to reduce juvenile crime. In *Schleifer*, Chief Judge Wilkinson

⁴⁰⁶ Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 300 (1998) (advocating expansion of the intermediate scrutiny standard, but only in limited circumstances); see also Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 298 (1992) ("Where intermediate scrutiny governs, the outcome is no longer foreordained at the threshold."). See generally, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 1-20 (1972) (identifying the evolution of intermediate scrutiny within the framework of equal protection). Professor Gunther characterized strict scrutiny as being "'strict' in theory and fatal in fact." *Id.* at 8. But see *Qutb v. Strauss*, 11 F.3d 488, 495 (5th Cir. 1993) (upholding juvenile curfew while purporting to apply strict scrutiny).

⁴⁰⁷ Sullivan, *supra* note 406, at 301 ("[Intermediate scrutiny] makes the Court more vulnerable to the charge of 'legislating from the bench.'"); Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1412 (1982) (noting that intermediate scrutiny gives courts "relatively little guidance in individual cases").

⁴⁰⁸ *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

⁴⁰⁹ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) ("The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." (citation omitted)); see also Shamen, *supra* note 134, at 174 ("All constitutional adjudication, regardless of the structure through which it is accomplished, necessarily entails a balancing or comparative evaluation of governmental and individual interests.").

eloquently argued why intermediate scrutiny is the most appropriate standard of review:

In light of the case law, two things seem clear. First, children do possess at least qualified rights, so an ordinance which restricts their liberty to the extent that this one does should be subject to more than rational basis review. Second, because children do not possess the same rights as adults, the ordinance should be subject to less than the strictest level of scrutiny. We thus believe intermediate scrutiny to be the most appropriate level of review and must determine whether the ordinance is 'substantially related' to 'important' governmental interests.⁴¹⁰

Given the Supreme Court's apparent unwillingness to expand the list of fundamental rights,⁴¹¹ coupled with the admittedly important rights at stake in juvenile curfew adjudication,⁴¹² the lower courts should apply intermediate scrutiny when reviewing curfew challenges because it is fair, workable, and consistent with Supreme Court authority.

The Supreme Court articulated the intermediate scrutiny standard in *Craig v. Boren*⁴¹³ in the context of a challenge to gender discrimination.⁴¹⁴ As applied to juvenile curfew challenges, its validity as

⁴¹⁰ *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999) (citations omitted).

⁴¹¹ See *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) ("There should be . . . great resistance to expand the substantive reach of [due process], particularly if it requires redefining the category of rights deemed to be fundamental.").

⁴¹² For example, see *United States v. Wheeler*, 254 U.S. 281 (1920), which states:

In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom

Id. at 293; see also *supra* Part IV.B.1 (discussing the right to travel).

⁴¹³ 429 U.S. 190, 197 (1976) (invalidating state statute that raised the drinking age for males to 21 while keeping the drinking age for women at 18, despite statistical evidence showing that males were more likely to drive while intoxicated).

⁴¹⁴ In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court invalidated the male-only admissions policy of the Virginia Military Institute under intermediate scrutiny, holding that the state's rationale failed to provide an "exceedingly persuasive justification" for the gender classification. *Id.* at 531. Since *Virginia*, there has been some debate about whether the requirement of an "exceedingly persuasive justification" has heightened the intermediate scrutiny standard for adjudicating gender discrimination claims. Language in the Court's decision and certain other judicial opinions implies that intermediate scrutiny remains the appropriate standard. See, e.g., *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895, 907-08 (11th Cir. 1997), *cert. denied*, 118 S.Ct. 1186 (1998); *Cohen v. Brown Univ.*, 101 F.3d 155, 183 (1st Cir. 1996). On the other hand, some commentators argue that the level of scrutiny as applied now falls between intermediate scrutiny and strict scrutiny. See, e.g., Jeffrey A. Barnes, Casenote, *The Supreme Court's "Exceedingly [Un]persuasive" Application of Intermediate Scrutiny in United States v. Virginia*, 31 U. RICH. L. REV. 523, 545-48 (1997); Christina Gleason, Comment, *United States v. Virginia: Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN'S L. REV. 801, 812-15 (1996); Jason M. Skaggs, Comment, *Justifying Gender-Based Affirmative Action Under*

a constitutional mechanism is not without its problems.⁴¹⁵ From a doctrinal standpoint, intermediate scrutiny developed under the aegis of equal protection jurisprudence.⁴¹⁶ In contrast to equal protection's three tiers of review, the substantive due process framework has traditionally been regarded as a two-tiered structure consisting of strict scrutiny and rational review.⁴¹⁷ Thus, challenges brought under substantive due process do not have recourse to intermediate scrutiny without arguably compromising doctrinal integrity.⁴¹⁸ However, this Note advocates the analysis of juvenile curfew challenges under equal protection, rather than substantive due process. Professors Nowak and Rotunda explain this position:

United States v. Virginia's "Exceedingly Persuasive Justification" Standard, 86 CAL. L. REV. 1169, 1190-96 (1998). Still other commentators argue that Virginia subjects gender discrimination claims to a strict scrutiny analysis. See, e.g., Candace Saari Kovacic-Fleischer, United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII, 50 VAND. L. REV. 845, 883 (1997); Steven A. Delchin, Comment, United States v. Virginia and Our Evolving "Constitution": Playing Peek-a-Boo with the Standard of Scrutiny for Sex-Based Classifications, 47 CASE. W. RES. L. REV. 1121, 1130-35 (1997). This Note takes no position on this debate, but rather proceeds on the assumption that the standard of review in gender discrimination cases remains the same.

⁴¹⁵ See George C. Hlavac, Comment, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1378 (1993) ("The intermediate-scrutiny test . . . has no basis whatsoever in precedent prior to *Craig v. Boren*, and is a much more malleable test that permits judges' subjective preferences to come into play. It is necessary to put an end to the Supreme Court's shell game" (footnotes omitted)).

⁴¹⁶ See *Craig*, 429 U.S. at 197; see also Scherr, *supra* note 24, at 192 (arguing that the Supreme Court should expand the substantive due process framework to include intermediate scrutiny).

⁴¹⁷ See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4, at 371 (4th ed. 1991). Professors Nowak and Rotunda note that the Supreme Court has not fully embraced intermediate scrutiny:

The Supreme Court may be using the intermediate standard in both substantive due process and equal protection cases that involve a regulation or impairment of fundamental constitutional rights. However, the Supreme Court has not formally adopted the intermediate standard as the test to be used in all fundamental rights cases.

Id.

⁴¹⁸ See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 317 (1993). Professor Fallon is cognizant of the perception that substantive due process is regarded as a two-tiered structure, but argues that the articulated framework belies the actual scrutiny applied in different cases. See *id.* at 314-15. Fallon discusses the use of an intermediate-type scrutiny within the contours of the substantive due process doctrine:

[T]he Supreme Court has appeared to engage in an ad hoc balancing of "the liberty (interest) of the individual" against "the demands of an organized society" in cases involving claims to avoid confinement in mental institutions, to be allowed to travel, to resist unwanted administration of antipsychotic drugs, and to receive care and treatment while subject to government custody other than criminal incarceration. *If judicial scrutiny were to reflect tiered assessments of the fundamentality of interests, those implicated in these cases should probably be recognized as occupying an intermediate category, subject to something less than strict scrutiny but more than rational basis review.*

Id. at 317 (emphasis added) (footnotes omitted).

A law that burdens the ability of all persons to exercise a fundamental right will be examined under substantive due process. A law that uses a classification that burdens or impairs the ability of only one class of persons who wished to exercise a fundamental constitutional right will be examined under equal protection.⁴¹⁹

Clearly, juvenile curfews burden the substantive due process rights of one class of persons—juveniles. Consequently, equal protection is the more appropriate doctrinal mechanism to adjudicate these claims. Equal protection adjudication provides lower courts with Supreme Court precedent for applying the intermediate scrutiny standard while dispensing with the need to expand the substantive due process framework to encompass the intermediate-scrutiny standard. While common principles underlying both doctrines certainly may support the expansion of substantive due process to include intermediate scrutiny,⁴²⁰ lower courts are on better legal footing using equal protection analysis in the absence of a clear mandate from the Supreme Court.

After determining that all three standards of review are available under an equal protection analysis, this Note now focuses on the trigger for heightened review. Because age is not a suspect class, courts traditionally review age-based restrictions under the rational review standard.⁴²¹ Using this standard, the Supreme Court has upheld mandatory retirement provisions for state police officers,⁴²² foreign service officers,⁴²³ and at one point, denied certiorari to review a case involving mandatory retirement for elected state court judges.⁴²⁴

Hence, analysis under both equal protection and due process turns on the same question: whether the curfew implicates any fundamental rights.⁴²⁵ However, because the Supreme Court has not for-

⁴¹⁹ NOWAK & ROTUNDA, *supra* note 417, § 14.3, at 579-80.

⁴²⁰ See Fallon, *supra* note 418, at 310 ("In its commonest form, substantive due process doctrine reflects the simple but far-reaching principle—also embodied in the Equal Protection Clause—that government cannot be arbitrary."); see also Scherr, *supra* note 24, at 191-92 (advocating the expansion of the substantive due process framework to include intermediate scrutiny). Discussion of the doctrinal integrity of the due process doctrine is beyond the scope of this Note.

⁴²¹ See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). "Suspect classifications" include those based on race and national origin. See NOWAK & ROTUNDA, *supra* note 417, § 14.3, at 575-76 (discussing suspect classifications).

⁴²² See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315-17 (1976) (upholding mandatory retirement provision that sets the retirement age for state police officers at 50).

⁴²³ See *Vance v. Bradley*, 440 U.S. 93, 111-12 (1979). In this case, foreign service officers challenged provisions that mandated retirement at age 60. They predicated their equal protection claim on the fact that the retirement age for foreign service personnel differed from the mandatory retirement age for general federal Civil Service personnel. The Court rejected the plaintiffs' equal protection challenge under rational review. See *id.*

⁴²⁴ See *Trafelet v. Thompson*, 444 U.S. 906 (1979) (denying certiorari).

⁴²⁵ See NOWAK & ROTUNDA, *supra* note 417, § 14.3, at 579-80.

mally embraced the intermediate scrutiny standard under substantive due process,⁴²⁶ this Note focuses on the equal protection arguments and the rights held directly by juveniles, rather than the parents' substantive due process right to rearing their children.⁴²⁷

One way to trigger heightened review à la *Nunez* is for a court to classify the right to freedom of movement (or intrastate travel) as a fundamental right.⁴²⁸ This approach, however, ignores several constitutional questions that could have implications beyond the realm of juvenile curfews.⁴²⁹ Assuming, arguendo, that the right to freedom of movement (or intrastate travel) is not considered a fundamental right, and that the curfew at issue excepts all fundamental rights from its purview, it appears that the curfew would not trigger heightened review. Supreme Court precedent, however, has triggered intermediate scrutiny in the absence of both suspect classifications and infringement of fundamental rights. For example, in *Plyler v. Doe*,⁴³⁰ the Court applied intermediate scrutiny to strike down a Texas law that denied school funding for the education of illegal immigrant children.⁴³¹ The Court applied heightened review, even though it determined that undocumented aliens were not a suspect class and education was not a fundamental right.⁴³² The Court held that the right to an education was sufficiently important to warrant intermediate scrutiny.⁴³³ Similarly, in the case of juvenile curfews, the right to freedom of movement is, at a minimum, an important right, one "which is historically part of the amenities of life."⁴³⁴ Coupled with the age classification, the infringement of this admittedly important right suffices to trigger intermediate scrutiny.⁴³⁵

⁴²⁶ See *id.* § 11.4, at 371.

⁴²⁷ See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 539 (D.C. Cir. 1999) (Edwards, C.J., concurring in part, concurring in result) (applying intermediate scrutiny based on the recognition that "parental rights are implicated in this case and they are truly significant – indeed, these rights are at the core of our society's moral and constitutional fiber").

⁴²⁸ See *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997); see also *Quth v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (triggering strict scrutiny based on the assumption, "without [actually] deciding, that the right to move about freely is a fundamental right").

⁴²⁹ See Hangartner, *supra* note 39, at 216-27 (discussing the implications of a fundamental right of intrastate travel on police "sweep" tactics).

⁴³⁰ 457 U.S. 202 (1982).

⁴³¹ See *id.* at 223.

⁴³² See *id.* at 223-24.

⁴³³ See *id.* at 223.

⁴³⁴ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (striking down vagrancy law as unconstitutionally vague); *Kent v. Dulles*, 357 U.S. 116, 126 (1958) ("Freedom of movement is basic in our scheme of values."). But see *Hutchins v. District of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999) (Silberman, J.) (arguing that the vagrancy cases do not support a fundamental substantive due process right to free movement because they were adjudicated under procedural due process).

⁴³⁵ See *Lutz v. City of York*, 899 F.2d 255, 270 (3d Cir. 1990) (upholding "cruising" ordinance under intermediate scrutiny). Cf. Fallon, *supra* note 418, at 317 (arguing that the Court's right-to-travel jurisprudence should "be recognized as occupying an intermedi-

As a practical matter, limiting the intermediate scrutiny standard to gender and illegitimacy cases would greatly minimize the utility of such a mechanism by precluding its application when it is needed most. Furthermore, limiting the application would run counter to the current trend of expansion of the intermediate-scrutiny standard.⁴³⁶ The Supreme Court has already applied intermediate scrutiny to regulations implicating the rights of minors in several cases, including: a ban on public education for illegal immigrant minors,⁴³⁷ a classification based on the illegitimacy of children,⁴³⁸ and a restriction on a minor's right to obtain contraception.⁴³⁹ Hence, applying the intermediate scrutiny standard to adjudicate juvenile curfews would be in accord with such decisions. Indeed, the recent trend in juvenile curfew challenges has been to apply intermediate scrutiny.⁴⁴⁰

Having determined that use of the intermediate scrutiny standard is legally supportable, both by precedent and by analogy, this Note returns to the question of its application. Before proceeding, however, the Note first considers the factual predicates of the juvenile crime problem and how it relates to curfews.⁴⁴¹ A look into the nature of juvenile crime, including its sources, characteristics, and alternative measures of control, provides the background to ensure that policymakers base curfews on "reasoned analysis rather than assumptions."⁴⁴²

ate category, subject to something less than strict scrutiny but more than rational basis review").

⁴³⁶ See Wexler, *supra* note 406, at 350 (advocating use of intermediate scrutiny standard to adjudicate cases involving physician-assisted suicide and sexual orientation issues).

⁴³⁷ See Plyler v. Doe, 457 U.S. 202, 223 (1982) (applying intermediate scrutiny to review a burden on the right to public education for illegal immigrant minors).

⁴³⁸ See Lalli v. Lalli, 439 U.S. 259, 267-68 (1978) (applying intermediate scrutiny to review classification based on illegitimacy of children).

⁴³⁹ See Carey v. Population Servs. Int'l, 431 U.S. 678, 690-91, 695-96 (1977) (Brennan, J., plurality opinion) (invalidating state law which prohibited sale of contraceptives to persons under 16, while limiting persons over 16 to purchases from pharmacists).

⁴⁴⁰ See, e.g., Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999) (en banc); Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999).

⁴⁴¹ This Note focuses on juvenile crime rather than juvenile delinquency as a whole. Although the increase in juvenile crime over the past decade has been attributed to drugs and guns, general juvenile delinquency has not been attributed to a single cause. See COORDINATING COUNCIL ON JUVENILE JUSTICE & DELINQUENCY PREVENTION, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 7 (1996) ("Delinquents, especially chronic delinquents, exhibit a variety of social and psychological deficits in their backgrounds. These deficits, often referred to as risk factors, stem from breakdowns in five influential domains in juveniles' lives: neighborhood, family, school, peers, and individual characteristics." (footnote omitted)).

⁴⁴² See Hutchins v. District of Columbia, 144 F.3d 798, 811 (D.C. Cir. 1998), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999).

B. Identifying the Juvenile Crime Problem: Sources, Characteristics, and Alternative Measures of Control

The general public views juvenile crime as a symptom of uncontrollable social decay. According to a recent Gallup poll, Americans believe that juveniles are responsible for over 40% of all violent crimes.⁴⁴³ The Office of Juvenile Justice and Delinquency Prevention tells a different story, one often ignored by the media hype: "[T]he hyperbole and alarm that surround much of the political posturing and new legislation obscure a simple fact: Very few juveniles engage in criminal acts, especially violent criminal acts."⁴⁴⁴ For example, in 1995, juvenile offenders were responsible for only 14% of all homicides in which the offender was identified.⁴⁴⁵ Although juveniles are responsible for a relatively small percentage of violent crimes, the recent, significant increases in juvenile crime rates are certainly cause for alarm.⁴⁴⁶ The percentage gains in juvenile arrests have outpaced rates for adults, particularly for violent offenses.⁴⁴⁷ Identifying the source of the problem may provide some insight into how to address the problem adequately.

The Office of Juvenile Justice and Delinquency Prevention has identified the source of the marked increase in juvenile crime as the "interrelationship [between] . . . drugs, guns, and juveniles."⁴⁴⁸ Drug traffickers solicit the assistance of juveniles as low-level dealers "partly because they work[] for less, [take] greater chances, and [are] more likely to escape detection and punishment."⁴⁴⁹ The increase in fire-arms progressed naturally from the drug problem.⁴⁵⁰ Not surprisingly, juvenile crime and victimization flourished in large, urban centers.⁴⁵¹ According to one study of juvenile crime in 1995, 84% of the counties in the United States reported no juvenile murder victims

⁴⁴³ See John Gibeaut, *Who's Raising the Kids?*, A.B.A. J., Aug. 1997, at 62.

⁴⁴⁴ REFORM INITIATIVES: 1994-1996, *supra* note 3, at 3.

⁴⁴⁵ See 1997 Update on Violence, *supra* note 44, at 12.

⁴⁴⁶ See REFORM INITIATIVES: 1994-1996, *supra* note 3, at 3 ("[J]uveniles commit a proportionately higher number of violent crimes than members of other age groups, and since the mid-1980's, juvenile offenders have become increasingly violent").

⁴⁴⁷ See *id.* ("The number of individuals of all ages arrested for murder and negligent manslaughter increased approximately 23 percent between 1985 and 1994, while the number of juveniles arrested for those crimes in the same period grew by 150 percent").

⁴⁴⁸ *Id.* at 4; Fox Butterfield, *Guns Blamed for Rise in Homicides by Youths in 80's*, N.Y. TIMES, Dec. 10, 1998, at A29 ("[V]irtually all the increase in homicides by juveniles in the late 1980's was attributable to crimes committed with handguns, not to a change in the nature of teen-agers."); see also David Byrd, *Down, But Not Out*, NAT'L J., Jan. 16, 1999, at 115 (noting that contributing factors to the declining crime rate include the end of the urban "crack cocaine epidemic" and an improving economy).

⁴⁴⁹ REFORM INITIATIVES: 1994-1996, *supra* note 3, at 4.

⁴⁵⁰ See *id.* at 4.

⁴⁵¹ See *id.*

and 9% reported only one.⁴⁵² In comparison, more than one third of all juvenile murder victims were killed in ten counties. Predictably, these ten counties host major cities: Los Angeles, Chicago, New York, Detroit, Dallas, Houston, Phoenix, San Bernardino, Philadelphia, and St. Louis.⁴⁵³

Juvenile crime and victimization also exhibit some identifiable gender and racial characteristics.⁴⁵⁴ According to national statistics, "[m]ales were responsible for most of the growth in homicides by juveniles from the mid-1980's through 1994."⁴⁵⁵ Furthermore, prior to 1987, the total number of African-American and Caucasian youth homicide offenders were roughly equal; after 1987, however, the number of African-American youth homicide offenders outpaced Caucasian youth homicide offenders.⁴⁵⁶ Finally, with regard to the victims of juvenile homicide offenders, national statistics for 1995 bear out the following facts: 85% of victims were male, 49% of victims were African-American, 48% were Caucasian, approximately 30% were under the age of 18, and 79% were killed with a firearm.⁴⁵⁷

Given this background, the most logical approach to reducing juvenile crime and victimization would be to attack aggressively the problems of guns and drugs. Another approach is to provide an outlet for productive activities, such as midnight basketball leagues and recreation centers.⁴⁵⁸ Probably the best approach, however, is to impose a curfew on juvenile offenders as a condition of their probation.⁴⁵⁹ This idea has a certain intuitive appeal; it does not implicate the rights of innocent juveniles, and it focuses directly on the nighttime activities of juvenile offenders. Structuring curfews in such a manner would focus limited public resources on youths identified as troubled, without unnecessarily restricting the activities of juveniles as

⁴⁵² See 1997 UPDATE ON VIOLENCE, *supra* note 44, at 2.

⁴⁵³ See *id.* The cities are listed in descending order according to the number of juvenile murder victims.

⁴⁵⁴ See OJJDP NATIONAL REPORT, *supra* note 4, at 24. With regard to juvenile victimization, note the following: Until the age of 11, boys and girls are equally likely to be murder victims; after the age of 11, male murder victimizations greatly outpace female murder victimizations. See *id.*

⁴⁵⁵ 1997 UPDATE ON VIOLENCE, *supra* note 44, at 12.

⁴⁵⁶ See *id.* at 13.

⁴⁵⁷ See *id.* at 12.

⁴⁵⁸ See Michele Comandini, *Cooldest Place in Town: Residents' Effort to Open Recreation Center Fills Void*, RECORD (Bergen County, N.J.), Dec. 3, 1998, at L1. The article quoted one 12-year old as saying that "[t]his is the best program in town, and the whole school comes here." *Id.*; see also Trollinger, *supra* note 30, at 966 ("Vancouver, British Columbia, dispersed loitering teens by playing, twenty-four hours a day, the ballads of Perry Como and Barry Manilow." (footnote omitted)).

⁴⁵⁹ See Freitas, *supra* note 49, at 244. The author argues that moving curfew authority from municipalities to the juvenile court system will strike a balance between preventing government intrusion of innocent youths, while still working toward the goal of reducing juvenile crime and victimization.

a class.⁴⁶⁰ Further, this approach minimizes the problem of usurping parental authority because parents whose children have not been adjudicated delinquent would retain full discretion over their children.

One problem with justifying this approach as a means of reducing juvenile crime is that it would only affect previously convicted juveniles. Hence, this approach would be ineffective in reducing the crime rate for first-time offenders. Nevertheless, statistics tend to show that chronic youth offenders "are responsible for the majority of serious crimes committed."⁴⁶¹ The probationary curfew focuses precisely on that group. Furthermore, a probationary curfew would also help reduce juvenile victimization because, as statistics tend to show, juveniles engaging in violent criminal behavior constitute the largest group of juvenile victims.⁴⁶²

Concerns expressed by cities that have enacted juvenile curfews support the use of the probationary curfew in lieu of a generalized juvenile curfew. In *Schleifer v. City of Charlottesville*,⁴⁶³ for example, Charlottesville offered evidence indicating "a high rate of recidivism among juveniles and a correlation between juvenile delinquency and adult criminal activity."⁴⁶⁴ Using the city's own evidence, the plaintiffs could have argued that the city should have addressed the problem of recidivism with a probationary curfew rather than restricting the activities of all juveniles.

Experience has proven that utilizing curfews as a condition of juvenile probation works more effectively and efficiently than a generalized juvenile curfew. For example, Boston has cut its juvenile (under seventeen) murder rate by over 80% since 1990 by imposing a 9:00 P.M. curfew as a condition of probation for youth offenders.⁴⁶⁵ Proba-

⁴⁶⁰ See *Curfew Ordinances*, *supra* note 23, at 96-97:

Those children most likely to be deterred by the [curfew] ordinance . . . are those least likely to engage in criminal activity. Conversely, those least likely to be deterred are the same children who most probably would engage in criminal activity. There is, however, one group, . . . [on] the "fringe" of the delinquent community, who would be deterred from remaining away from home at night by their parents if the threat of a sanction were available against the parents [Hence], it certainly is not irrational for a legislative body to experiment with it in an attempt to stem an increase in juvenile criminality.

Id.

⁴⁶¹ 1997 UPDATE ON VIOLENCE, *supra* note 44, at 25.

⁴⁶² See Jon Marcus, *Cleaning Up Crime In Boston*, SCHOLASTIC UPDATE, Nov. 2, 1998, at 8 ("Most young killers and victims . . . were repeat criminals out on probation, flouting nighttime curfews.").

⁴⁶³ 159 F.3d 843 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999).

⁴⁶⁴ *Id.* at 848.

⁴⁶⁵ See Marcus, *supra* note 462, at 8; see also Stephen Bennett, *Operation Night Light Helps Keep Probationers Honest*, BOSTON GLOBE (North), May 3, 1998, at 10 (detailing the success of Boston's probationary-curfew program). Boston's success in Project Night Light has not gone unnoticed; several other cities are following suit. See, e.g., Jim Keary, *Youths on Proba-*

tion officers stepped-up enforcement, focusing their efforts on identified troubled youths.⁴⁶⁶ Undeniably, this reduction in the youth crime rate is nothing short of remarkable.

Consequently, probationary curfews are not only less restrictive of juvenile rights in general, they are also more effective in addressing the state's legitimate interest. This fact strongly undermines the Fourth Circuit's backup conclusion in *Schleifer* that the town's curfew, "with its narrow scope and comprehensive list of exceptions, represents the least restrictive means to advance Charlottesville's compelling interests."⁴⁶⁷ The success of probationary curfews suggests that general juvenile curfews are not necessary to serve a compelling state interest and hence invalid under the strict scrutiny standard.⁴⁶⁸ Nevertheless, even courts that have invalidated juvenile curfews maintain that under certain limited circumstances, a generalized juvenile curfew may be a valid exercise of a state's police power.⁴⁶⁹ The next section discusses the application of the intermediate scrutiny standard to juvenile curfew challenges and the baseline offers of proof necessary to survive the standard.

C. Applying the Intermediate Scrutiny Standard

Given the fact that only a small percentage of juveniles engage in criminal behavior, generalized curfews restrict the entire juvenile population for the criminal acts of a small minority.⁴⁷⁰ Nevertheless, "[t]he Constitution certainly does not put legislatures to the choice of solving the entirety of a social problem or no part of it at all."⁴⁷¹ As one recent commentary expressed, "[C]urfews remain a limited and inadequate response to the problems of [juvenile crime and victimization]," but they "present both possibilities and perils and should be

tion to Get Curfew Checks, WASH. TIMES, Jan. 24, 1998, at A11 (reporting the District of Columbia's adoption of the Boston program); Elizabeth Mehren, *Boston's Youth Violence Program Becomes Model for Nation*, L.A. TIMES, Aug. 24, 1998, at A5; Jean Rimbach, *Paterson Effort Takes New Aim at Youth Crime*, RECORD (Bergen County, N.J.), July 10, 1998, at L-1 (reporting adoption of pilot program in New Jersey).

⁴⁶⁶ See Marcus, *supra* note 462, at 8.

⁴⁶⁷ *Schleifer*, 159 F.3d at 852.

⁴⁶⁸ See *Hutchins v. District of Columbia*, 144 F.3d 798, 826 (D.C. Cir. 1998) (Tatel, J., concurring) ("[S]trict scrutiny would require the District to meet the heavier burden of demonstrating that the curfew is a less restrictive, more effective means of reducing juvenile crime and victimization than other alternatives, such as after school programs."), *rev'd en banc*, 188 F.3d 531 (D.C. Cir. 1999).

⁴⁶⁹ See *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. Unit A Oct. 1981) ("We express no opinion on validity of curfew ordinances narrowly drawn to accomplish proper social objectives.").

⁴⁷⁰ See *supra* note 437 and accompanying text.

⁴⁷¹ *Schleifer*, 159 F.3d at 851 (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

considered as one option [for] . . . short- and long-term strategies."⁴⁷² Intermediate scrutiny provides courts with a mechanism to fairly and carefully assess the coexistence of those "possibilities and perils."

The operative question remains: How specific do statistics proffered by a state have to be to survive intermediate scrutiny? National statistics illustrate a sharp peak in juvenile crime at 3:00 P.M. on school days.⁴⁷³ These statistics undercut the rationale that many cities offer in support of juvenile curfews. Similarly, national statistics that tend to show that seventeen-year olds are responsible for most juvenile crimes⁴⁷⁴ raise serious questions about the efficacy of curfews that exempt that age group. Consequently, this Note argues that legislatures should support enactments of general juvenile curfews with specific, localized juvenile crime and victimization statistics in order to ward off possible constitutional invalidations.

Craig v. Boren, in which the Supreme Court applied the intermediate scrutiny standard, is particularly instructive.⁴⁷⁵ *Craig* involved a challenge to an Oklahoma statute that prohibited males under the age of twenty-one from purchasing "nonintoxicating" 3.2% beer, while the minimum age requirement for females was eighteen.⁴⁷⁶ The issue, the Supreme Court stated, was "whether such a gender-based differential constitutes a denial to males [eighteen to twenty] years of age of the equal protection of the laws in violation of the Fourteenth Amendment."⁴⁷⁷ Aside from some basic differences,⁴⁷⁸ the statistical issues implicated in *Craig* bear a striking resemblance to those involved in juvenile curfew cases.

In recent juvenile curfew cases, the courts have cited the following passage from *Craig* to support the proposition that specific and detailed statistical information is not necessary to uphold juvenile curfews:

It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical

⁴⁷² *Juvenile Curfews and Gang Violence*, *supra* note 39, at 1709-10 (analyzing juvenile curfews under the theoretical paradigms of civil libertarianism, communitarianism, and critical race theory).

⁴⁷³ See 1997 UPDATE ON VIOLENCE, *supra* note 44, at 26. Adult violence, in contrast, peaks at around 11:00 P.M. See *id.*

⁴⁷⁴ See *id.* at 12 (providing statistics showing that 17-year olds are the largest age group of youth murderers).

⁴⁷⁵ See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁴⁷⁶ See *id.* at 192.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Craig* involved a gender discrimination claim adjudicated under the Equal Protection Clause, see *id.* at 204, whereas juvenile curfew challenges have been varied and inconsistent, see *supra* Part III. Furthermore, *Craig* involved a gender-based differential age classification, see *Craig*, 429 U.S. at 192, whereas curfews differentiate ages without regard to gender. Although classifications based on age are not suspect, juvenile curfews infringe on the important, if not fundamental, right to freedom of movement.

technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.⁴⁷⁹

While this argument seems persuasive on its face, context dictates an alternative interpretation. The Court in *Craig* used this language to invalidate the gender-based regulation despite the presence of some statistics justifying differential treatment.⁴⁸⁰ Oklahoma offered five different statistical surveys in support of its regulation: (1) a survey of eighteen- to twenty-year olds detailing alcohol related driving offenses; (2) a survey showing that youths ages seventeen to twenty-one, especially males, were proportionally overrepresented among traffic accident injuries and fatalities; (3) a roadside survey showing that males were more likely than females to drink and drive; (4) nation-

⁴⁷⁹ *Craig*, 429 U.S. at 204 (footnote omitted). The literature is replete with commentary cautioning the use of statistics in litigation. See, e.g., Daniel Shaviro, *Statistical Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530 (1989); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971). The nature of the statistics implicated in juvenile curfew adjudication differs, however, from the kind that causes consternation in the minds of scholars. Professor Tribe explained:

My concern is with cases in which mathematical methods are turned to the task of deciding what occurred on a particular, unique occasion, as opposed to cases in which the very task defined by the applicable law is that of measuring the statistical characteristics or likely effects of some process or the statistical features of some population of people or events.

Tribe, *supra*, at 1338-39 (emphasis added).

The statistics implicated in juvenile curfew adjudication clearly fall within the italicized phrase. Moreover, generalized juvenile curfews necessarily infringe upon the rights of innocent minors. The purpose of requiring statistical data is to ensure that such measures actually work toward the goal of reducing juvenile crime and victimization—to rationalize the infringement upon the innocent minors. Because the enactment of curfews is often driven in response to statistical increases in juvenile crime, a demand for particularized information is not unreasonable. Indeed, such information lends itself particularly well to quantitative analysis. Furthermore, relatively simple statistics can be used to determine whether a curfew is having an effect on juvenile crime and victimization rates. Contrary to the language in some judicial opinions, this would not require the judiciary “to be well versed in the rigors of experimental or statistical technique.” See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 849 (4th Cir. 1998), cert. denied, 119 S. Ct. 1252 (1999) (quoting *Craig*, 429 U.S. at 204).

Although particularized statistics may be the best measure of the efficacy of juvenile curfews, they are of course subject to error. One potential problem is isolating cause and effect. A drop in juvenile crime in a particular community could be caused by a variety of factors. But inquiry into the underlying assumptions of such statistics presumes that they have been introduced or required in the first place. However, even a finding that a curfew is a contributing cause to reduction of juvenile crime and victimization, if not the sole cause, would arguably be sufficient. See also Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048 (1985) (noting the increased acceptance of statistical methods, but cautioning against abuse).

⁴⁸⁰ See *Craig*, 429 U.S. at 223-25 (Rehnquist, J., dissenting) (arguing that the 2% arrest rate for males, in comparison to the .18% arrest rate among females, confirms that males are much more likely to be arrested for “driving under the influence”).

wide FBI statistics showing an increase in drunk driving arrests; and (5) statistical evidence gathered in other jurisdictions, tending to show increased accidents resulting from youths drinking and driving.⁴⁸¹

The Court believed that only the first survey offered "the most focused and relevant" evidence to the issue at bar.⁴⁸² This survey showed that .18% of females and 2% of males between eighteen and twenty years of age were arrested for driving under the influence.⁴⁸³ Nevertheless, the Court struck down the regulation, holding that "if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'"⁴⁸⁴

The Court rejected the four other statistical surveys offered by Oklahoma, concluding they offered "only a weak answer to the equal protection question presented here."⁴⁸⁵ For example, the Court concluded that the accident statistics for youths ages seventeen to twenty-one, which showed that more males than females were killed and injured, were weak justifications because they "drew no correlation between the accident figures for any age group and levels of intoxication found in those killed or injured."⁴⁸⁶ These types of defects—relating to age classifications and levels of intoxication—bear a striking similarity to defects often found in juvenile curfew adjudication.

The Supreme Court in *Craig* noted that unless statistics are focused and relevant, they are not sufficiently probative of the local situation to withstand intermediate scrutiny.⁴⁸⁷ Similarly, in juvenile curfew cases, specific statistics showing an appropriate correlation between the curfew and juvenile crime in the affected area should arguably be required because national statistics tend to weaken the justification for general juvenile curfews.⁴⁸⁸ Information regarding the age of juvenile offenders and victims, as well as the time frame in which juvenile crimes and victimizations are committed, is critical because it goes to the very heart of the curfew's justification. Despite its cautionary language about proving sociological propositions with statistics, the *Craig* case supports this construction.⁴⁸⁹ The *Craig* Court, in applying intermediate scrutiny, rejected certain statistical justifications proffered to justify the age-sex differential:

⁴⁸¹ See *id.* at 200-01.

⁴⁸² *Id.* at 201.

⁴⁸³ See *id.*

⁴⁸⁴ *Id.* at 201-02.

⁴⁸⁵ *Id.* at 201.

⁴⁸⁶ *Id.* at 201 n.9.

⁴⁸⁷ See *id.* at 201.

⁴⁸⁸ See *supra* Part V.B.

⁴⁸⁹ See *Craig*, 429 U.S. at 204.

[M]any of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, make no effort to relate their findings to age-sex differentials as involved here. Indeed, the only survey that explicitly centered its attention upon young drivers and their use of beer—albeit apparently not of the diluted 3.2% variety—reached *results that hardly can be viewed as impressive in justifying either a gender or age classification.*⁴⁹⁰

Similarly, general statistics should not be sufficient to justify a particular juvenile curfew. Rather, cities should be required to substantiate the enactment of their curfews with age and time specific evidence. Once sufficiently specific statistics are proffered, however, this Note expresses no opinion about which percentages meet the “substantially related” threshold, and which do not. Rather, the arguments in favor of requiring detailed information are made to ensure that the legislatures are acting on the basis of “reasoned analysis rather than assumptions.”⁴⁹¹ In other words, detailed information best gauges the need for or efficacy of the juvenile curfew. Detailed information disclosing the time frame in which juvenile crime and victimization takes place and the age group responsible will provide a proper baseline to make that assessment.

CONCLUSION

Juvenile curfew adjudication suffers from pronounced confusion over the appropriate constitutional standard. The recent decisions in the Fourth, Ninth, and D.C. Circuits highlight this quandary. Nevertheless, the Supreme Court has repeatedly declined to review the constitutionality of juvenile curfews, leaving the lower courts to their own devices. This Note has endeavored to reconcile this conflict, seeking unifying principles through empirical, doctrinal, practical and precedential analyses. In conclusion, this Note has found that intermediate scrutiny is the best standard for lower courts to apply.

One source of confusion has been the Supreme Court case *Bellotti v. Baird*, which elucidated criteria for when the courts should treat the constitutional rights of minors with less favor than the rights of adults. In the context of juvenile curfews, however, *Bellotti's* application has been varied and inconsistent. Hence, *Bellotti* should be considered in light of other Supreme Court jurisprudence that adjudicates the rights of minors.

Despite inconsistencies in articulating proper constitutional standards, recent cases exhibit a clear trend toward some form of height-

⁴⁹⁰ See *id.* at 203 (emphasis added) (citations omitted).

⁴⁹¹ See *Hutchins v. District of Columbia*, 144 F.3d 798, 811 (D.C. Cir. 1998) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982)), *rev'd en banc*, 188 F.3d 531 (D.C. 1999).

ened review.⁴⁹² Two factors have arguably spurred this trend: (1) the *Bellotti* case; and (2) the important rights that are being implicated (i.e. right to freedom of movement). This Note has examined the federal cases adjudicating juvenile curfews and found that a majority of judges have chosen either strict scrutiny or intermediate scrutiny as the appropriate constitutional standard. The cases that have articulated strict scrutiny have exhibited textual departures from the normally rigorous standards involved in a strict-scrutiny analysis. Furthermore, analysis of the applied strict scrutiny standards reveals that juvenile curfews are subject to judicial inquiry more consistent with the precepts of intermediate scrutiny.

Because juvenile curfews restrict the rights of a specific class of persons, challenges are more properly analyzed under equal protection rather than substantive due process. Further, intermediate scrutiny has already been explicitly articulated within the strictures of equal protection, whereas doctrinal purists would maintain that substantive due process remains a two-tiered structure, consisting of rational review and strict scrutiny. Since age is not a suspect classification, and assuming that the curfew makes exceptions for all fundamental rights, strict scrutiny is not warranted. In the context of equal protection, however, the Supreme Court has applied intermediate scrutiny in the absence of both a suspect class and an infringement on a fundamental right. In curfew laws, the synergy between the age classification and the burden on the right to freedom of movement is sufficient to trigger intermediate scrutiny. Hence, application of the intermediate level of scrutiny to juvenile curfew challenges comports with notions of justice for minors, while dispensing with the need to expand the list of fundamental rights that would trigger a substantive due process challenge.

The intermediate scrutiny standard provides lower courts with a mechanism to balance the constitutional rights of minors with a city's interest in reducing juvenile crime, reducing juvenile victimization, and increasing parental responsibility. Recent cases illustrate that the intermediate scrutiny standard is both practically workable and legally supportable. Generally, cities are able to advance compelling state interests that withstand strict scrutiny, which a fortiori withstand the intermediate standard. The second prong of intermediate scrutiny will prove to be the decisive element in the equation. The inquiry will hinge on the means-ends fit or, more specifically, whether sufficient statistical support exists correlating the efficacy of the curfew with both the age classifications and the time dimension of juvenile crime. In view of the underlying causes of juvenile crime, the availability of

⁴⁹² See *supra* Part IV.A.1.

other more efficient and less restrictive alternatives, and the fact that only a small minority of juveniles engage in criminal activity, cities should support their curfews with particularized, local statistics showing a substantial relationship to their articulated purposes in order to ward off possible constitutional invalidations.